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A

SELECTION OF CASES

ON THE

LAW OF CONTRACTS

BY

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IN TWO VOLUMES

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CHAPTER IV.

JOINT AND SEVERAL CONTRACTS.

SLINGSBY'S CASE.

In the Exchequer Chamber, Michaelmas Term, 1587.

[*Reported in* 5 *Reports* 18.]

Slingsby and Frances, his wife, brought an action of covenant in the King's Bench against Roger Beckwith, and declared on an indenture tripartite between the defendant, Roger Beckwith, of the first part, William Vavasor, Frances Slingsby, and Elizabeth, sister of the said Roger, of the second part, and George Harvey and the said Frances (then his wife), another of the sisters of the said Roger, of the third part; and declared that the said Roger Beckwith, the defendant by the said indenture, *convenisset*, *promisisset*, and *concessisset ad* and *cum dictis* Will. and Francisco, and *ad* and *cum præd'* Georgio and Francisca *uxore ejus*, and *assignat' suis*, and *ad* and *cum quolibet* and *qualibet eorum*, *quod præd'* Rogerus *ad sigillationem* and *deliberationem ejusdem indentur' fuit legitime* and *solus seisitus de Rectoria de* Aldingfleet *in Com' Eborum*. And on this covenant issue was joined, and the *venire facias* was *de vicinet' Castri Eborum*, and the issue by *nisi prius* was tried for the plaintiff, and damages assessed, upon which judgment was given in the King's Bench. And now in a writ of error in the Exchequer Chamber before Anderson, C.J., of the Common Pleas, Manwood, C.B., of the Exchequer, Windham, Periam and Rhodes, JJ., of the Common Pleas, and Gent and Clark BB. of the Exchequer and of the coif, it was resolved that the said judgment was erroneous, for it appears by the plaintiff's own showing in his declaration that the plaintiffs only cannot maintain an action of covenant, but the other covenantees ought to have joined in the action with them, notwithstanding these words (and *ad* and *cum quolibet* and *qualibet eorum*), for as to these words this difference was agreed. When it appears by the declaration that every of the cove-

nantees hath or is to have a several interest or estate there, when the covenant is made with the covenantees, and *cum quolibet eorum*, these words *cum quolibet eorum* make the covenant several in respect of their several interests. As if a man by indenture demises to A. Blackacre, to B. Whiteacre, to C. Greenacre, and covenants with them and *quolibet eorum*, that he is lawful owner of all the said acres, etc., in that case in respect of the said several interests by the said words and *cum quolibet eorum* the covenant is made several. But if he demises to them the acres jointly, then these words *cum quolibet eorum* are void, for a man by his covenant (unless in respect of several interests) cannot make it first joint, and then to make it several by the same or the like words, *cum quolibet eorum ;* for although sundry persons may bind themselves and *quemlibet eorum*, and so the obligation shall be joint or several at the election of the obligee, yet a man cannot bind himself to three, and to each of them to make it joint or several at the election of several persons for one and the same cause, for the Court would be in doubt for which of them to give judgment which the law would not suffer, as it is held in 3 H. 6, 44*b*. There it appears that one brought a replevin against two persons for an ox, who made several avowries, each by himself in his own right ; and there by advice of all the justices both the avowries abated for the inconveniency, that if both the issues should be found for the avowants, the Court could not give judgment on them severally for one and the same thing. Also the covenantor in the case at bar would be divers times charged for one and the same thing, and therefore the said words and *cum quolibet eorum* are in such case but words of amplification and abundance, and cannot sever the joint cause of action. And it was also resolved that an interest could not be granted jointly and severally. As if a man grants *proximam advocationem*, or makes a lease for years of land to two jointly and severally, these words severally are void, and they are joint-tenants, so if a man makes a feoffment in fee by deed to three, and warrants the land to them, and *cuilibet eorum*, this warranty is joint and not several. But in such case if their estates were several, their warranty should be several accordingly, but a power or authority as to make livery or to sell, etc., may be joint and several, for there they have not any interest or action, but are as servants to others. See 16 Eliz. Dyer, 337–338 acc.; Sir Anthony Coke's Case, 6 E. 2 ; Covenant Br. 49 ; 12 H. 4, 18 in Detinue. And for this error the judgment was reversed. Another error was assigned concerning the *visne*, but as to that the Court did not deliver any opinion.

SORSBIE AND OTHERS *v.* PARK.

IN THE COURT OF EXCHEQUER, NOVEMBER 15, 1843.

[*Reported in* 12 *Meeson and Welsby*, 146.]

THIS was an action of covenant, tried at the Northumberland Summer Assizes, 1842, when a verdict was found for the plaintiffs on all the issues, subject to the opinion of the Court, on the following special case :

The declaration stated, that whereas, after the passing of a local act of Parliament, 26 Geo. 3, intituled "An Act for widening, etc., the streets and other public places, and for opening new streets, markets, and passages within the town of Newcastle-upon-Tyne," etc., and before the making of the articles of agreement and deed-poll thereinafter mentioned, to wit, on etc., a certain scheme was set on foot and entertained by divers persons, and, among others, by T. Featherston, T. Doubleday, J. C. Anderson, J. R. Featherston, and T. Anderson, the defendant, the then mayor, aldermen, and common council of the town of Newcastle-upon-Tyne for the time being, and the mayor and burgesses of the same town, viz., a scheme for erecting and completing, by subscription, in the same town, a covered corn-market or corn-exchange, with avenues and approaches thereto, and for the purchase, by the said mayor, etc., of the same market when erected and completed ; and whereas, by certain articles of agreement made and entered into between the said T. Featherston, T. Doubleday, J. C. Anderson, J. R. Featherston, and T. Anderson, being five of the subscribers, of the first part ; the mayor, aldermen, and common council, of the second part ; and the mayor and burgesses of the said town, of the third part ; it was witnessed, that they, the parties thereto of the first part, at the request of the said mayor, etc., for themselves and each and every of them, their and each and every of their heirs, executors, and administrators, jointly and severally did, and each of them did, in consideration of the sum of £5000, to be paid as thereinafter mentioned, covenant, promise, declare, and agree to and with the said mayor, aldermen, and common council, and their successors, and to and with the said mayor and burgesses and their successors, in manner following ; that is to say, that they, the said persons, parties thereto of the first part, should and would, within the space of four years from the date thereof, make, erect, etc., a covered corn-market or corn-exchange, with avenues and approaches thereto,

and also should and would, as soon as conveniently might be after the making and erecting of the said corn-market or corn-exchange, sell and convey the same, and the freehold and inheritance thereof, unto and to the use of the said mayor and burgesses, and their successors, at or for the price or sum of £5000. (Then followed a covenant, by the mayor, aldermen, and common council, and the mayor and burgesses, to purchase the said corn-market at the said sum of £5000.) And whereas the covenants and agreements so entered into by the said parties thereto of the said first part were so entered into by them for and on behalf of themselves and others, the subscribers thereinafter mentioned: and whereas, also, for carrying into effect the said scheme, by a certain deed-poll of even date with the said articles, the several persons whose hands and seals were thereunto subscribed (of whom the defendant was one, and the said T. Featherston, T. Doubleday, J. C. Anderson, J. R. Featherston and T. Anderson, were others) did, for themselves severally and respectively, and for their respective heirs, executors, and administrators, thereby severally covenant, promise, and agree to and with each other, and the executors, administrators, and assigns of each other respectively, to advance and pay the several sums of money respectively subscribed and placed opposite their respective names, for the purpose of erecting a corn-market in Newcastle-upon-Tyne, subject to such alterations as should be thought convenient by the general committee for the time being appointed by the subscribers, and also to complete the said corn-market within four years, and also to make such payments in respect of the said several and respective shares as should be deemed expedient by such committee; and the said several persons whose hands and seals were so to the said deed-poll subscribed and set as aforesaid, of whom the said defendant was one, did, for themselves severally and respectively, and for their respective heirs, executors, and administrators, severally promise and agree to and with the plaintiffs in manner following; that is to say, in case of the default of such committee to require such payments within four years, then to make such payments unto such persons, and at such times and in such proportions, as should be required by the plaintiffs, and that the said moneys should be applied for the purposes aforesaid, or some of them, in such manner as the said mayor, etc., should direct. And the plaintiffs say, that they did not, nor did any of them, subscribe any sum or sums of money for the purposes in the said deed-poll mentioned, or any of them; and that they became parties to the said deed-poll, and such covenants therein as above men-

tioned, in order that they, in case of the default of the committee in the deed-poll mentioned to require such payments within four years next ensuing the date thereof, might receive or appoint such payments from the said subscribers, for and on behalf of the said mayor, etc., to the intent that the first-recited articles of agreement might be carried into full effect. And the plaintiffs further say, that the said defendant did, on, etc., subscribe the said deed-poll for the sum of £500, which was then and there subscribed and placed by the said defendant opposite to his seal and name ; that, after the making of the said deed-poll, a general committee was appointed in pursuance of the said deed, and that the said committee did make default in requiring the shareholders, and, among others, the defendant, to make any payment in respect of their respective shares, except to an amount after the rate of £20 per cent. upon each of the said shares, within the space of four years from the date of the said deed ; that thereupon the plaintiffs, after the expiration of the said four years, and a reasonable time before the day of payment thereinafter next mentioned, to wit, on, etc., did give notice and require the defendant to pay, on, etc., to William Chapman, Esq., at, etc., the sum of £150, for and in respect of his said shares, being a call after the rate of £30 per cent. upon his said shares, to be applied for the purposes mentioned in the said deed, or some of them. Breach, the non-payment thereof at the time and place mentioned in the notice, or at any time since, to the said W. Chapman, or to the plaintiffs, or any person on their behalf.

The defendant pleaded *non est factum*, and several special pleas.

The Court was to be at liberty (*inter alia*) to refer to the deed-poll and the articles of agreement.

It was proved that certain alterations had been made in the deed prior to its execution, for the purpose of giving the corporation some control in the execution of the contract, and to facilitate the performance of the articles of agreement. The case for the plaintiffs having been closed, a verdict was taken for them, by consent, upon all the issues, damages £150, subject to the following, among other, objections on the part of the defendant : That as to the first issue, there was a material variance between the deed-poll set out in the declaration, and the instrument offered in proof ; and, secondly, that the plaintiffs could not sustain the present action on the deed offered in proof, without joining other parties as plaintiffs. If the Court should be of opinion, under these circumstances, that the verdict ought to have been for the defendant upon the first or other issues, the verdict upon such issues or issue was to be set aside,

and a verdict entered for the defendant; but otherwise the present verdict was to stand.

The deed-poll to which reference is made in the case commenced as follows: We whose hands and seals are hereunto subscribed and set, for ourselves severally and respectively, and for our respective heirs, executors, and administrators, do hereby severally covenant, promise, and agree to and with each other, and the executors, administrators and assigns of each other respectively, and to and with Benjamin Sorsbie, George Shadforth, and William Smith, the plaintiffs, their executors and administrators, in manner following; that is to say: To advance and pay the several sums of money respectively subscribed and placed by us opposite to or against our respective seals and names hereunder written, for the purpose of purchasing and pulling down and removing the houses, shops, etc.; and also for the purpose (if the general committee for the time being appointed by the subscribers hereunto or the major part of them assembled at any meeting shall deem it expedient) of obtaining or endeavoring to obtain an act or acts of Parliament for authorizing the purposes aforesaid; and also to complete the corn-exchange and corn-market and other buildings and improvements comprised and described in such plan and specification as aforesaid within the space of four years; and also to make such payments for and in respect of our several and respective shares hereinafter mentioned to such person and persons, and at such times, and in such proportions as shall be deemed expedient and required by such committee as aforesaid for all or any of the purposes aforesaid. And in case of the default of such committee to require such payments within the space of four years next ensuing, then unto such person and persons, and at such times, and in such proportions as shall be required by the said B. Sorsbie, G. Shadforth, and W. Smith, or the survivor of them, or the executors of such survivor; and then the said moneys shall be applied for the purposes aforesaid or some of them in such manner as the mayor, aldermen, and common council of the said town of Newcastle-upon-Tyne for the time being, or the major part of them, shall direct. And it was further mutually understood and agreed by and between them respectively, that each of them subscribing the sum of £50 for the purposes aforesaid should have and be entitled to one share of and in the said intended exchange, market-houses, shops, and premises, and the benefit and advantage resulting therefrom (the whole shares thereof not exceeding nine hundred), in respect of each sum of £50 so subscribed, and so in proportion for as many sums of £50 as they should

respectively subscribe for. And that such subscriber should only be answerable or responsible to the amount of the share or shares placed by him opposite to his name as aforesaid, and not to any greater amount, for or in respect of any of the purposes aforesaid.

Stephen Temple, for the plaintiffs.

Kelly, *contra*.

Lord ABINGER, C. B. When this case was before us on a former occasion,[1] we were anxious to have the whole deed before us, that we might find, out of the four corners of it, if possible, some distinct appearance of a several interest, which might authorize the construction Mr. Temple contends for, and therefore we desired it might be produced before us in such a form as to raise the argument properly upon the deed. It is now before us, and it seems to me that no part of it points out the certainty, or even the probability, of a several interest in the parties. I think the rule is plain and certain, and requires no authority ; it is correctly stated by Mr. Preston in the passage in Shep. Touch., which Mr. Temple has cited. Where the words of a covenant are in their nature ambiguous, so that they may be construed either way, then the deed in which they are inserted supplies the mode of their construction. If it exhibit a several interest in the parties, you may construe it as a several covenant, and *vice versâ*. But there is no rule to say that words which are expressly a joint covenant by several persons shall be construed as a several covenant, unless there is something to lead to that construction. Where there are several parties, if the interest is joint, the covenant is construed as a joint covenant. If a party covenant with A. and B. to do something for B., and the words themselves are otherwise free from ambiguity, it must be a joint covenant. In the case of Withers *v.* Bircham, 3 B. & Cr. 254, the very word "-either" introduced an ambiguity ; because it could not have been meant as a covenant that the parties were both to do that which might be done by one only ; the words were "or either of them," and that might be a sufficient reason in that case why the covenant was held to be several, because the interest was several. But I am sorry to say we see no ground upon this deed, or any part of it, to justify such an interpretation. The covenant is clearly a joint covenant ; but even if it were ambiguous, there is nothing in the whole of the deed to show that there is such a several interest as to justify us in construing it otherwise. I am afraid, therefore, there must be judgment for the defendant upon that issue.

[1] In Trinity Term, 1843.

PARKE, B. I concur with my lord in the view he has taken of this case, although, when the case was before the Court upon the first argument, I had some little doubt about it, and was desirous of seeing whether any light could be thrown upon it by having the whole deed stated upon the face of the record, so that we might give judgment upon it, or the parties, instead of amending, might have gone down to trial, and raised the same question upon the plea of *non est factum*. I think the correct rule is laid down by Gibbs, C.J., in the case of James *v.* Emery, with the qualification stated by Mr. Preston, in the note in Sheppard's Touchstone, 166. That rule is, that a covenant will be construed to be joint or several according to the interest of the parties appearing upon the face of the deed, if the words are capable of that construction; not that it will be construed to be several by reason of several interests, if it be expressly joint. Suppose there were a covenant with A. and B. jointly, that a certain thing should be done by the covenanter; both of those persons must sue. But where it appears upon the face of the deed that A. and B. have several interests, they must sue separately; for though the words be *prima facie* joint, they will be construed to be several, if the interest of either party appearing upon the face of the deed shall require that construction. That I take to be the true rule; and, therefore, taking the law to be as I have stated it, with the qualification annexed to it in the note of Mr. Preston, the question is, whether there is any interest appearing on the deed to require us to construe what is *prima facie* a covenant with all the other subscribers and with the three plaintiffs, jointly, to be a covenant with the plaintiffs only, which is stated to be its legal effect in the declaration. Now, I cannot collect that they had a separate interest from all the other subscribers, either during the first four years or during the last year, because during the last year the subscribers had such an interest as to require the other subscribers to pay toward carrying into effect the purposes of the deed. Therefore the terms of this instrument being a contract *prima facie* with the plaintiffs and the other subscribers jointly, there appears to me to be no expression of interest in the deed to enable us to construe its terms otherwise; and, consequently, they ought all to have sued jointly.

Gurney and Rolfe, BB., concurred.

Judgment for the defendant.

WILLIAM PAIN BEECHAM AND RICHARD SMITH *v.* HENRY TILDEN SMITH.

IN THE COURT OF QUEEN'S BENCH, MAY 28, 1858.

[*Reported in Ellis, Blackburn & Ellis* 442.]

THE declaration stated that defendant, on December 11th, 1852, by his promissory note, now overdue, promised to pay to plaintiff £1000 on demand, with interest for the same at £4 per cent. per annum from the date thereof. Breach: Non-payment.

Pleas: 1. As to one third of plaintiff's claim. "That the promissory note in the declaration mentioned was and is a promissory note made by the plaintiff Richard Smith, the defendant, and one Tilden Smith, and was and is in the words and figures following, that is to say:

"'£1000 BATTLE, December 11th, 1852.

"'On demand we jointly and severally promise to pay to William Pain Beecham and Richard Smith, or order, the sum of £1000 for value received, with interest for the same at £4 per cent. per annum from the date hereof.

"'HENRY TILDEN SMITH,
"'TILDEN SMITH,
"'RICHARD SMITH.'

"And the defendant saith that the said Richard Smith, in the said note mentioned as one of the payees thereof, and as one of the makers thereof, was and is the plaintiff Richard Smith: and the said note, at the time it was made, was one upon and by virtue whereof the defendant, in case he paid the same, or more than one-third part thereof, would be entitled to call upon the plaintiff Richard Smith to pay and to recover from him contribution. And the defendant further saith that, by reason of the premises, in case the plaintiffs were to recover from him in this action the amount of the said promissory note and interest, he, the defendant, would be entitled to sue for and recover from the plaintiff Richard Smith one-third part of the amount so recovered from him, the defendant."

2. As to the residue of the declaration. A similar plea.

Demurrer to both pleas. Joinder.

Replication (first), to both pleas. That the plaintiffs issued their writ in this action against the defendant alone, and upon and in respect only of his several liability upon the said promissory note, and not otherwise or as one of the joint makers of

the said note. And the plaintiffs say that the said promissory note was made and given to the plaintiffs only as and being trustees for third persons, as the said makers then well knew, and not for or in respect of any debt, claim or demand by the said plaintiffs on the said makers of the said note or either of them due to or claimable by the plaintiffs, or either of them, in their or his personal right.

Demurrer. Joinder.

Lush for the plaintiffs.

Bovill for the defendants.

Lord Campbell, C.J. I am of opinion that the pleas are bad. This is an action brought upon the promise by the defendant contained in the promissory note made jointly and severally by himself and two others, one of those two others being one of the plaintiffs. The contract sued upon is the several contract of the defendant; and the fact that there is also, upon the same instrument, a joint contract by the three makers, is no defence. The cases cited on the other side are all of them distinguishable. Even if the pleas had been good, I think the replication would have been an answer.

Coleridge, J. I am of the same opinion. The counsel for the defendant has very properly given up any argument founded upon the policy of avoiding circuity of action. That argument might be material, if there were only one plaintiff here, and he the maker of the promissory note. But, practically, there are three promissory notes signed by three different parties; and the note declared on is not that signed by the plaintiff Richard Smith, but that signed by the defendant. Upon that note the plaintiffs have an undoubted right of action.

Erle, J. Two plaintiffs sue one of the makers of a joint and several promissory note. The pleas set up that the note is joint and several, and that one of the plaintiffs is a maker of the joint note. But the several note here sued upon is a note made by the defendant, to which that plaintiff is not a party. The pleas, therefore, are no answer to the action.

Crompton, J. As a joint contract, this note; undoubtedly, would not be enforceable at law. But the plaintiffs are at liberty to sue on it as a several note by any of the makers. The defendant who is so sued is not at liberty to claim to have the note treated as a joint note. The argument, that the plaintiff would be liable to contribution, has been rightly met by the answer that the contribution would not be by the same parties as those suing. I had some doubt, at first, whether Richards *v.* Richards[1] was not an authority in favor of the

[1] 2 B. & Ad. 447.

pleas, as having decided that the contract there could not be enforced as a several contract, because it was also a joint contract. But, upon looking into the case, I see that it was decided on quite a different ground, and does not affect the present case.

Judgment for the plaintiffs.

SAMUEL OSBORN, JR., AND OTHERS *v.* MARTHA'S VINEYARD RAILROAD COMPANY.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, JANUARY 11, 1886.

[*Reported in* 140 *Massachusetts* 549.]

GARDNER, J. This action was originally commenced by Samuel Osborn, Jr., one of the plaintiffs. After the trial of the case, Osborn moved to amend his writ by adding, as joint plaintiffs with him, Shubael L. Norton and Nathaniel M. Jernegan, which motion was allowed. The action then proceeded upon the allegation in their declaration, that the defendant owed the three plaintiffs $600, according to the account annexed, which was for 20 tons of iron rails at $30 per ton, giving credit for $400, paid to Norton and Jernegan.

The first question which arises is whether the contract made by the plaintiffs with the defendant was joint or several. The report finds that the three plaintiffs purchased 20 tons of iron rails in their own names, giving a promissory note, signed by the three, to the vendor therefor. In this purchase, there was no reference to any separate interest of the purchasers in the iron rails, and they became joint owners thereof. They then sold the rails to the defendant, making no reservation of any single interest in any one of the vendors. The defendant promised jointly, not separately, to pay the three plaintiffs the price therefor. This contract was joint, the several payees having therein a joint interest, so that no one could sue for his proportion. When they jointly undertook to sell the rails in one mass to the defendant, they held themselves out to be joint owners, voluntarily assuming that relation to the property sold to the defendant. The contract became a joint contract, the plaintiffs being joint creditors, not several, of the defendant. 2 Chit. Cont. (11th Am. ed.) 1340. The three owners represented, in effect, that they had a common interest in the property, without any difference in their respective interests and possessions, and that payment was to be made of the entire sum.

The two plaintiffs, Norton and Jernegan, in behalf of themselves and of Osborn, settled with the defendant for the amount due, in full payment and satisfaction of their demand, receiving as payment in part money and in part shares of stock in the defendant corporation. The plaintiff Osborn insists that he is not bound by this settlement; and that, in the name of the three vendors, he can recover in money that portion of the original indebtedness to which, as between himself and his associates, he was entitled.

The interest of the three plaintiffs in their joint claim against the defendant was such that each had an interest in the entire claim. One of them had not only an interest in the third which might be his share, but also in the two thirds belonging to the others. It has been settled in this action that one cannot maintain an action for his share; the three must join in the suit, because each one has a joint interest in the entire amount due them, and in every part thereof. Osborn is debarred from bringing suit for his third part, because Norton and Jernegan own that third as fully as does Osborn. Each having such an interest in the debt due, one being unable to sue for the whole or his share thereof, it follows that each one, being interested in the entire claim, can settle it with the defendant. Each of the three, by the manner of their dealing with the defendant and with the property, has effectually authorized his partners in the contract to dispose of his interest by payment, settlement, or accord and satisfaction, and to release the defendant from its obligation under the contract. 1 Pars. Cont. 25.

In this case, there was no formal release by writing under seal. The plaintiffs Norton and Jernegan, upon the settlement, "gave to the defendant a receipted bill of the demand for the price of the rails and interest." The delivery of the shares of stock by the defendant to the plaintiffs, and the payment of the money, were accepted in satisfaction and payment of the debt. It was an accord and satisfaction unconditional, actually executed, and accepted. This operates to release the defendant from further liability upon the contract. No particular form of words is necessary to constitute a valid release. "Any words which show an evident intention to renounce the claim upon, or to discharge, the debtor are sufficient." 2 Chit. Cont. (11th Am. ed.) 1146. The plaintiff Osborn in his argument has not urged that this settlement was not in effect a release. If this transaction between the parties, if assented to by all who participated in it, was such as to release the defendant from all liability to Norton and Jernegan, of which there is no contention, then it follows that the release of two was the re-

lease of all. When there is such a unity of interest as to require a joinder of all the parties interested in a personal action, the release of one is as effectual as the release of all. Austin *v.* Hall, 13 Johns. 286 ; Decker *v.* Livingston, 15 Johns. 479.

In this case, fraud is not set up, nor is there any suggestion of fraud in the transaction. The settlement was in effect an accord and satisfaction, which operates as a release. Wallace *v.* Kelsall, 7 M. & W. 264, 272.

The settlement made by Norton and Jernegan with the defendant released the defendant from further liability upon its contract with the plaintiffs, and the action cannot be maintained. By the terms of the report, there must be

Judgment for the defendant.

G. A. Torrey for the defendant.

C. G. M. Dunham for the plaintiffs.

STATE OF MAINE *v.* JOSEPH CHANDLER AND ANOTHER.

IN THE SUPREME JUDICIAL COURT OF MAINE, FEBRUARY 26, 1887.

[*Reported in* 79 *Maine* 172.]

ON exceptions to the ruling of the Court in overruling a demurrer to the declaration.

The opinion states the case.

Charles P. Allen, county attorney, and *Lewis C. Stearns* for the State.

Wilson and *Lumbert* and *Powers* and *Powers* for defendants.

FOSTER, J. The defendants as sureties, together with one Benjamin R. Condon as principal, entered into a joint and several recognizance upon an indictment found against the said Condon as a common seller of intoxicating liquors. Default having been entered against all the parties upon the recognizance, *scire facias* is brought against these two defendants, who file a general demurrer.

The only question involved is whether the proper parties are joined as defendants in this action.

It is the general rule in actions *ex contractu* that objection to the non-joinder of a defendant can be taken only by plea in abatement, thereby giving the plaintiff a better writ, by therein disclosing the names of those who ought to be joined. Harwood *v.* Roberts, 5 Maine, 442 ; Reed *v.* Wilson, 39 Maine, 586 ; Richmond *v.* Toothaker, 69 Maine, 455. But to this rule there

is an exception, as well settled as the rule itself—that if it appears from the face of the declaration or other pleading on the part of the plaintiff, that a person not made defendant was a joint contractor with those who are defendants in the suit, there being no averment of the death of such person, then such non-joinder is good ground for demurrer, as well as abatement. Harwood *v.* Roberts, *supra ;* Richmond *v.* Toothaker, *supra ;* Gould Pl. ch. 5, § 115 ; 1 Chit. Pl. 46 ; McGregor *v.* Balch, 17 Vt. 567.

It is likewise held to be ground for demurrer where there is a mis joinder of defendants, in actions upon contract, where too many persons are made defendants and the objection appears upon the face of the plaintiff's pleadings. Chitty states it thus : " If too many persons are made defendants, and the objection appear on the pleadings, either of the defendants may demur, move in arrest of judgment, or support a writ of error ; and even if the objection do not appear upon the pleadings, the plaintiff may be non-suited upon the trial, if he fail in proving a joint contract." 1 Chitty Pl. 44 ; Gould Pl. ch. 5, § 104. " If it appears on the pleadings, it gives rise to a demurrer ; if it appears at the trial, to an adverse verdict." Dicey on Parties, 507.

It is elementary law that where three or more parties contract jointly and severally, all are to be sued in one action, or each may be sued severally. It is improper, as all the authorities hold, to join two and omit the others, for in such case they are sued neither jointly nor severally, as they promised. And in case the plaintiff does not see fit to proceed against them severally, it is the undoubted right of the defendants to have all their joint promisors or obligors joined with them in the suit. Harwood *v.* Roberts, *supra ;* Bangor Bank *v.* Treat, 6 Maine, 207.

The recognizance in this case, although taken in a criminal process, and depending for its validity upon a record based upon such proceeding, is wholly collateral to the original proceeding, and in its nature a civil matter. State *v.* Baker, 50 Maine, 53. It is an obligation of record (Longley *v.* Vose, 27 Maine, 188), founded upon contract (State *v.* Boies, 41 Maine, 345), and entered into by the recognizors upon certain conditions (State *v.* Burnham, 44 Maine, 284), upon the breach of which the recognizance became forfeited, and an absolute debt of record, in the nature of a judgment, was created, and upon which *scire facias* properly lies for the recovery of the forfeiture. State *v.* Kinne, 39 N. H. 135, 137 ; State *v.* Harlow, 26 Maine, 75 ; Commonwealth *v.* Green, 12 Mass. 1 ; Commonwealth *v.* McNeill, 19 Pick. 138.

But *scire facias* upon a recognizance entered into in a criminal proceeding, in no respect partakes of the original criminal proceeding out of which it originated, but is held to be a civil action. State *v.* Harlow, 26 Maine, 76 ; State *v.* Kinne, 41 N. H. 239 ; Commonwealth *v.* McNeill, 19 Pick. 138 ; McLellan *v.* Lunt, 14 Maine, 257 ; State *v.* Baker, 50 Maine, 53.

This action, then, must stand or fall like any other founded upon contract. It is brought against two only of the three parties who jointly and severally recognized to the State—now plaintiff in this suit. It is not brought against them in accordance with their obligation entered into by them. They are sued neither jointly nor severally. There are too many joined as defendants to correspond with their several obligation—too few to correspond with it as joint. This being so, the misjoinder in the one case, or the non-joinder in the other, as we have said, is good ground of demurrer, since the fact appears upon the face of the plaintiff's declaration that there was a joint and several obligation entered into by three, all of whom are known as well to the plaintiff as to the defendants in this suit.

It makes no difference that one of the recognizors was the principal in the criminal process, and the other two were his sureties. The recognizance itself determines the liability of the parties, and, as appears from the record, that liability was joint and several in relation to the three parties who became bound by it. It was not a joint and several undertaking on the part of the sureties only ; and the plaintiff cannot, by its pleading, change their liability from that which they assumed. The case of Commonwealth *v.* McNeill, *supra*, was *scire facias* upon recognizance taken in a criminal proceeding, as in the case at bar, but against only one of three who had severally recognized. In that case, as in this, one of the recognizors was named as principal and the other two as sureties, and all recognized in the same sum. One of the objections raised at the trial related to an alleged variance between the allegations and the proof. "On reference to the recognizance," says Shaw, C.J., "it appears that the parties were severally bound, and therefore it was a several recognizance by each ; though as all were joined in one recognizance, they might have been proceeded against jointly."

No intimation is given by the Court that they were liable except jointly or severally.

Attention has been called to R. S., ch. 133, § 20, which provides that "when a person, under recognizance in a criminal case, fails to perform its condition, his default shall be recorded, and process shall be issued against such of the conusors as the prosecuting officer directs," etc.

Whether the "process" mentioned is such as has been commenced in this case, it is unnecessary to determine at this time, and with the facts as they exist in relation to the proceeding before us; for, even if this is such process as the statute contemplates, we cannot believe it was the intention of the legislature to give the prosecuting officer authority to violate well-settled rules of pleading. Full efficacy can be given to the statute without any such violation. Were it otherwise, then there might be reason in giving the statute such a construction as would accomplish the object sought to be attained in its enactment.

Whether or not an amendment would be proper, and if so, upon what terms, is a matter to be considered by the Court below.

Exceptions sustained.

Peters, C.J., Walton, Danforth, Emery, and Haskell, JJ., concurred.

JELL *v.* DOUGLAS.

IN THE KING'S BENCH, EASTER TERM, 1821.

[*Reported in* 4 *Barnewall & Alderson* 374.]

ASSUMPSIT for goods sold and delivered by Jell to the defendant. Plea, general issue. At the trial, before Abbott, C.J., at the last summer assizes for the county of Kent, the proof was, that the goods were sold to the defendant by the plaintiff and his son, who were in partnership. The son had died before the commencement of this action. It was contended that this was a variance, inasmuch as the contract stated in the declaration was with the plaintiff alone; whereas that given in evidence was with the plaintiff and another. Abbott, C.J., reserved the point, and directed the jury to find a verdict for the plaintiff, with liberty to the defendant to move to enter a nonsuit. A rule *nisi* for that purpose having been obtained in last Michaelmas Term.

Marryat and *Chitty* now showed cause.

ABBOTT, C.J. It is a well-established rule, that where two persons are joint-sellers of goods, they must both join in an action brought to recover the price. It was decided in Richards *v.* Heather,[1] that a party may maintain an action against a surviving partner without describing him as such; and the

[1] 1 B. & A. 29.

reason of that decision was this, that if the partners had been alive, and one only was sued, that circumstance could only be taken advantage of by plea in abatement, and was no defence upon the general issue. But if one of two joint-contractors sue, both being alive, that is a variance, and a good defence upon the general issue. It seems, therefore, to be reasonable, that where a surviving joint-contractor sues, the fact of his being survivor should appear in the declaration. In a note to Webber *v.* Tivill,[1] Williams lays it down, that it is necessary that all the persons with whom a contract has been made, if living, should join in the action, and if any of them are dead, that fact should be stated. From my own experience I can say, that that has been the general practice, and I think it ought not to have been departed from in this instance The rule for a nonsuit must be made absolute.

Rule absolute.

Gurney and *Comyn* were to have argued in support of the rule.

MARTIN *v.* CRUMP.

In the King's Bench, Easter Term, 1698.

[*Reported in* 2 *Salkeld* 444.]

Two joint merchants make B. their factor ; one dies, leaving an executor ; this executor and the survivor cannot join, for the remedy survives, but not the duty ; and therefore on recovery he must be accountable to the executor for that.

ANDERSON, Administrator, etc., *v.* MARTINDALE.

In the King's Bench, June 9, 1801.

[*Reported in* 1 *East* 497.]

In covenant by the plaintiff as administrator of John Anderson deceased, the declaration which was entitled of Michaelmas Term generally stated, that by indenture of four parts made September 16th, 1789, between Elizabeth Wyatt, John Anderson (the intestate), R. Mackreth, and J. Martindale (the defendant), it was witnessed that for the considerations therein mentioned R. Mackreth for himself, his heirs, executors, etc., and the defendant as his surety, etc., did, and each of them did jointly

[1] 2 Saund. 121, n. 1.

and severally covenant to and with the said John Anderson deceased, in his lifetime, his executors, administrators, and assigns, and also to and with the said Elizabeth Wyatt and her assigns, that he, Mackreth, his executors, etc., should pay to the said John Anderson, his executors, administrators, or assigns £60 per annum during the life of Elizabeth Wyatt. It then averred that the intestate died May 21st, 1799, after which—viz., on November 7th, 1799—administration was granted to the plaintiff, and that although Elizabeth Wyatt is still living, yet that R. Mackreth has not paid to the deceased, nor since his death to the plaintiff as administrator the said annuity, etc., but that eight quarters were in arrear in the lifetime of the intestate, etc., and after his death two quarters more, etc., and so alleges a breach by the defendant, and concludes in the usual form with a profert of the letters of administration, the date whereof is the same day and year in that behalf above mentioned. To which there was a general demurrer and joinder.

Praed in support of the demurrer.

Gibbs, *contra*.

Lord Kenyon, C.J. There is no distinguishing Slingsby's Case from the present. There Beckwith by indenture covenanted, promised, and agreed to and with William Vavasor and Francis Slingsby, and to and with George Harvey and Frances his wife, and their assigns, and to and with each of them (*quolibet et qualibet eorum*) that he Beckwith at the sealing and delivery of the indenture was lawfully and sole seized of a certain rectory. And in an action of covenant thereon by Slingsby and his wife, the issue was found for the plaintiff, and judgment obtained thereon in B. R.; but on a writ of error brought in the Exchequer Chamber that judgment was on great deliberation reversed, because the other covenantees had not joined in the action with the plaintiffs, and they alone could not maintain the action, notwithstanding the words *et ad et cum quolibet et qualibet eorum*. And this distinction was taken, which appears to be very sensible, that where every of the covenantees is to have a several interest or estate, there the addition of the words *cum quolibet eorum* will make the covenant several in respect of their several interests. As if one by indenture demise Blackacre to A. and Whiteacre to B., etc., and covenant with them and each of them that he is lawful owner of the said acres; there in respect of the several interests the covenant by those words is made several. But if he demise to them the acres jointly, then those words are void, for a man by his covenant cannot, unless in respect of several interests, make it first joint,

and then several by those or the like words. The learned reporter then gives several other instances, all tending to the same conclusion. And the reason given is that where the interest is joint, if several were to bring actions for one and the same cause, the Court would be in doubt for which of them to give judgment. So here I should say, here is a covenant to two to pay an annuity to one of them; shall both bring actions for the same interest where only one duty is to be paid? Which of them ought to recover for the non-performance of the covenant? The defendant is only bound to pay the annuity once. This is different therefore from the case put by Lord Coke, where the covenant is to several for the performance of several duties to each; there the covenant shall be moulded according to the several interests of the parties, and each shall only recover for a breach so far as his own interest extends. It has been assumed in the argument for the plaintiff, that the covenantees had different interests, but that is not so; the covenant to both was for the same thing, and though the benefit were only to one of them, yet both had a legal interest in the performance of it, and therefore the legal interest being joint during the lives of both, on the death of one it survived to the other. If indeed the covenant had been to each by two different deeds, though for the same duty, there could not have been a joinder in action, but here the parties claim by the same title, and therefore the law coincides with the justice and convenience of the case. No difference can arise on the omission of the words executors and administrators in the covenant to Elizabeth Wyatt and her assigns, which words are added to the covenant to John Anderson; the legal effect is the same, for a covenant to one and her assigns extends equally to her executors and administrators.

Per CURIAM. Judgment for the defendant.

RAWSTORNE AND OTHERS *v.* GANDELL AND ANOTHER.

IN THE COURT OF EXCHEQUER, APRIL 15, 1846.

[*Reported in* 15 *Meeson & Welsby* 304.]

THIS was an action brought by the managing committee of the Liverpool & Preston & North Union Railway, registered under the stat. 7 & 8 Vict. ch. 110, to recover damages from the defendants, who were the engineers employed upon the line for the non-performance of their contract to survey the line, and furnish plans and sections to be deposited in compli-

ance with the standing orders of Parliament. The writ was issued in January, 1846, issue was joined, and the cause was set down for trial at the Liverpool assizes on March 21st. On the evening of the 20th the defendant's attorney withdrew the pleas then upon the record, and delivered a plea *puis darrein* continuance, of a release, jointly executed to the defendants by two of the plaintiffs named Duncan and Randall. The record was thereupon withdrawn.

Crompton now moved for a rule, calling upon the defendants to show cause why the plea of release should not be set aside, on the ground that it was pleaded by collusion between the plaintiffs Duncan and Randall and the defendants, and in fraud of the other plaintiffs. His affidavits stated the following facts: After the failure in making the deposit of the plans, etc., to comply with the standing orders, the present proceedings against the defendants were resolved upon at a meeting of the shareholders, and the releasors and all the original shareholders and notice of that resolution. It was also resolved that one guinea per share, on account of the deposit, should be returned to all shareholders desirous of giving up their shares. The releasor Duncan had been placed on the provisional committee through the influence of the defendants, but had never taken any active part in the management of the undertaking, and out of 200 shares allotted to him he had presented 150 for the return of the guinea. After the present action was brought Duncan and another of the plaintiffs, and two other persons filed a bill in Chancery against all the other plaintiffs, to have the accounts taken under the authority of that Court, and to restrain the present action. The defendants' attorneys filed this bill, and also commenced a cross-section for an alleged balance due to the defendants. With respect to Randall, the other releasor, he had been on the managing committee, which was chosen from the provisional committee, but had never taken any active part in their proceedings. He had received back the guinea on all the shares allotted to him, and executed a deed whereby, in consideration of that repayment, he did "release and forever quit claim unto the provisional committee of the company, all and all manner of actions, suits, reckonings, claims, and demands, both at law and in equity, which he could, should, or might have against the said committee, by reason or on account of the said projected undertaking, or any transaction, matter, or thing, in any wise relating to the same, but subject to a ratable participation in any surplus fund."

POLLOCK, C.B. I think there should be no rule. One of these releasors, undoubtedly, had no interest which would en-

title him to release the action, but the other had. No doubt this is the case of an exercise of a strict legal right, in a manner very mischievous and injurious to the other plaintiffs, and for which the parties may, perhaps, be responsible to another tribunal ; but we have no power to interfere if there be the smallest right or real interest on which the release may operate at law. If the plaintiff Duncan is not suing altogether on behalf of the other plaintiffs—if he be not a mere name—the release by him is effectual, and we ought not to interfere. A court of law has no machinery for working out the equities of these conflicting interests. In truth, this application is neither more nor less than a bill of equity, to discover whether Duncan is or is not still interested in the concern.

ROLFE and PLATT, BB., concurred.[1]

Rule refused.

WILLIAM HALE *v.* LEONARD V. SPAULDING AND OTHERS.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, JANUARY 4, 1888.

[*Reported in* 145 *Massachusetts* 482.]

CONTRACT upon an instrument under seal, dated May 23d, 1885, by the terms of which the defendants, six in number, agreed to pay to the plaintiff on demand, six sevenths of any loss to which he might be subjected as the endorser of a certain note for a corporation.

Aaron H. Saltmarsh alone defended. He filed an answer alleging that the plaintiff, since the execution of the contract declared on, had executed and delivered the following paper, under seal, to one of the joint obligors under the contract :

" Received of L. V. Spaulding $1060.84, in full satisfaction for his liability on the document" signed, etc., and dated May 23d, 1885.

At the trial in the Superior Court, before Hammond, J., it appeared that on September 20th, 1886, the defendants, except Saltmarsh, settled with the plaintiff for their proportionate part of the amount alleged to be due under the agreement declared on, and the plaintiff executed the paper under seal, annexed to the answer, and delivered it to the defendant Spaulding. The plaintiff offered to prove facts showing that, in giving said sealed paper annexed to the answer, there was no intention of releasing the defendant Saltmarsh. The judge ruled that said

[1] The concurring opinion of Parke, B., has been omitted.—ED.

offer was not material, and that said sealed paper released the defendant Saltmarsh, and ordered a verdict for the defendant. The plaintiff alleged exceptions.

W. H. Moody for the plaintiff.

H. N. Merrill for Saltmarsh.

C. ALLEN, J. The words "in full satisfaction for his liability" import a release and discharge to Spaulding, and, the instrument being under seal, it amounts to a technical release. The plaintiff does not controvert the general rule that a release to one joint obligor releases all. Wiggin *v.* Tudor, 23 Pick. 434, 444; Goodnow *v.* Smith, 18 Pick. 414; Pond *v.* Williams, 1 Gray, 630, 636. But this result is avoided when the instrument is so drawn as to show a contrary intention. 1 Lindl. Part. 433; 2 Chit. Con. (11th Am. ed.) 1154 *et seq.* *Ex parte* Good, 5 Ch. D. 46, 55. The difficulty with the plaintiff's case is that there is nothing in the instrument before us to show such contrary intention. Usually a reservation of rights against other parties is inserted for that purpose, or the instrument is put in the form of a covenant not to sue. See Kenworthy *v.* Sawyer, 125 Mass. 28; Willis *v.* De Castro, 4 C. B. (N. S.) 216; North *v.* Wakefield, 13 Q. B. 536, 541. Parol evidence to show the actual intention is incompetent. Tuckerman *v.* Newhall, 17 Mass. 580, 585. The instrument given in this case was a mere receipt under seal of money from one of several joint obligors, in full satisfaction for his liability on the document signed by himself and others. There is nothing to get hold of to show an intent to reserve rights against the others. He might already have discharged each of them by a similar release.

Exceptions overruled.

KING AND ANOTHER *v.* HOARE.

IN THE COURT OF EXCHEQUER, NOVEMBER 25, 1844.

[*Reported in* 13 *Meeson & Welsby* 494.]

DEBT for goods sold and delivered. Plea, that the said goods were sold and delivered by the plaintiffs to the defendant jointly with one N. T. Smith, and not to the defendant alone, and were to be paid for to the plaintiffs by the defendant jointly with the said N. T. Smith, and not by the defendant alone, and that the said moneys in the declaration mentioned were, at the time of the accruing thereof, to wit, etc., due from the defendant and the said N. T. Smith, jointly, and not from the defend-

ant alone ; that the said moneys continuing and being due and payable by the defendant jointly with the said N. T. Smith, the plaintiffs heretofore, to wit, etc., in the Court of our lady the Queen at Westminster, impleaded the said N. T. Smith in an action of debt, for the detaining and not paying of the said moneys and debt, and for and in respect of the same identical causes of action in the declaration mentioned, and such proceedings were thereupon had in the said action, that afterward, to wit, on, etc., the plaintiffs, by the consideration and judgment of the said Court, recovered in the said action against the said N. T. Smith the said several moneys and sum of £16,000 above demanded, as also £90 6*s*. as damages and costs, whereof the said N. T. Smith was convicted, as by the record and proceedings thereof, still remaining in the said Court of our lady the Queen at Westminster, more fully and at large appears, which said judgment still remains in full force and effect, and not the least reversed or made void. Verification.

Special demurrer, assigning for causes, that the defendant has pleaded in bar of the action matter which ought to have been pleaded, if at all, in abatement ; that the plea amounts to a plea of never indebted ; that the plea does not aver that the moneys were not due from the defendant and N. T. Smith severally and jointly ; that the recovery of a judgment against one of two debtors in a sum certain does not of itself, or without satisfaction, operate in law to bar the action of the creditor against the other debtor, and that the plea ought to have concluded with a statement that the defendant was ready to verify it by the record.

Joinder in demurrer.

The case was argued on November 21st by

J. Henderson in support of the demurrer.

Bramwell, contra.

PARKE, B. The plea in this case, to an action of debt, stated that the contract in the declaration was made by the plaintiff with the defendant and one N. T. Smith jointly, and not with the defendant alone ; and that, in 1843, the plaintiff recovered a judgment against Smith for the same debt with costs, "as appears by the record remaining in the Court of Queen's Bench, which judgment remains in full force and unreversed," concluding with the common verification.

To this plea there was a demurrer, assigning several special causes : First, that it was a plea in abatement not properly pleaded ; to which the answer is that the plea does not give a better writ, and is clearly a plea in bar. Secondly, that it amounts to the general issue, which it certainly does not, for it

admits a debt originally due. Thirdly, that it does not aver that the debt was not due from the defendant and Smith severally as well as jointly ; to which it was properly answered that the plea sufficiently shows the identical contract declared upon to be joint, and that it cannot be contended, *prima facie* at least, that the same contract was both joint and several. And, lastly, it was objected, that the plea ought to have concluded with a verification by the record. The Court, however, intimated its opinion, that such an averment, though proper when the plea contains matter of record only, was not proper where the averment of matter of record was mixed with averments of matters of fact, on which an issue of fact may be taken. In the case of a plea of judgment recovered for the same cause of action, the matter of record is the only thing which can be directly put in issue on the plea. If the judgment were recovered for another cause, there must be a new assignment.

The matters of form being disposed of, the question is reduced to one of substance, whether a judgment recovered against one of two contractors is a bar in an action against another.

It is remarkable that this question should never have been actually decided in the courts of this country. There have been apparently conflicting dicta upon it. Lord Tenterden, in the case of Watters *v.* Smith, 2 B. & Ad. 892, is reported to have said, that a mere judgment against one would not be a defence for another. My Brother Maule stated in that of Bell *v.* Bankes, 3 Man. & G. 267, that a security by one of two joint debtors would merge the remedy against both. In the case of Lechmere *v.* Fletcher, 1 C. & M. 634, Bayley, B., strongly intimates the opinion of the Court of Exchequer, that the judgment against one was a bar for both of two joint debtors, though the point was not actually ruled, as the case did not require it. In the absence of any positive authority upon the precise question we must decide it upon principle and by analogy to other authorities, and we feel no difficulty in coming to the conclusion that the plea is good.

If there be a breach of contract or wrong done, or any other cause of action by one against another, and judgment be recovered in a court of record, the judgment is a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the suit attained, so far as it can be at that stage ; and it would be useless and vexatious to subject the defendant to another suit for the purpose of obtaining the same result. Hence the legal maxim, *transit in rem judicatam*, the cause of action is changed into matter of record, which is of a

higher nature, and the inferior remedy is merged in the higher. This appears to be equally true where there is but one cause of action, whether it be against a single person or many. The judgment of a court of record changes the nature of that cause of action, and prevents its being the subject of another suit, and the cause of action being single cannot afterward be divided into two.[1]

The distinction between the case of a joint and several contract is very clear. It is argued that each party to a joint contract is severally liable, and so he is in one sense, that if sued severally and he does not plead in abatement, he is liable to pay the entire debt; but he is not severally liable in the same sense as he is on a joint and several bond, which instrument, though on one piece of parchment or paper, in effect comprises the joint bond of all, and the several bonds of each of the obligors, and gives different remedies to the obligee. Another mode of considering this case is suggested by Bayley, B., in the case of Lechmere *v.* Fletcher, and was much discussed during the argument, and leads us to the same conclusion. If there be a judgment against one or two joint contractors, and the other is sued afterward, can he plead in abatement or not? If he cannot, he would be deprived of a right by the act of the plaintiff, without his privity or concurrence, in suing and obtaining judgment against the other. If he can, then he may plead in bar the judgment against himself; and if that be not a bar, the plaintiff might go on, either to obtain a joint judgment against himself and his co-contractor, so that he would be twice troubled for the same cause, or the plaintiff might obtain another judgment against the co-contractor, so that there would be two separate judgments for the same debt. Further, the case would form another exception to the general rule, that an action on a joint debt, barred against one, is barred altogether; the only exception now being where one has pleaded matter of personal discharge, as bankruptcy and certificate. It is quite clear, indeed, and was hardly disputed, that if there were a plea in abatement, both must be joined, and that if they were, the judgment pleaded by one would be a bar for both; and it is impossible to hold that the legal effect of a judgment against one of two is to depend on the contingency of both being sued, or the one against whom judgment is not obtained being sued singly and not pleading in abatement. These considerations lead us, quite satisfactorily to our own minds, to the conclusion that where judgment has been obtained for a debt, as well as a

[1] A portion of the opinion relating to the effect of a judgment against one of two joint tort feasors has been omitted.—Ed.

tort, the right given by the record merges the inferior remedy by action for the same debt or tort against another party.

During the argument a decision of Marshall, C.J., in the Supreme Court of the United States, was cited as being contrary to the conclusion this Court has come to ; the case is that of Sheehy *v.* Mandeville. We need not say we have the greatest respect for every decision of that eminent judge, but the reasoning attributed to him by that report is not satisfactory to us, and we have since been furnished with a report of a subsequent case, in which that authority was cited and considered, and in which the Supreme Judicial Court of Massachusetts decided, that in an action against two on a joint note, a judgment against one was a bar. Ward *v.* Johnson, 13 Tyng's Reports, 148.

For these reasons we are of opinion that our judgment must be for the defendant.

Judgment for the defendant.

CHARLES COWLEY *v.* EPHRAIM B. PATCH, Executor.

In the Supreme Judicial Court of Massachusetts, March 3, 1876.

[*Reported in* 120 *Massachusetts* 137.]

Contract against the executor of John W. Graves. The declaration contained two counts, the first of which was for money had and received to the plaintiff's use by the said Graves. The second count was for professional services and disbursements. The answer alleged, among other things, that if the testate was ever indebted to the plaintiff, as alleged, he was jointly indebted with one Henry H. Fuller, now living, and that the plaintiff had elected to prosecute his suits, for the indebtedness and identical subject-matter in each count contained, against Fuller to final judgments, which judgments had been against the plaintiff, and in favor of Fuller. The case was submitted to the Superior Court upon an agreed statement of facts in substance as follows :

Each count declares on a distinct and separate demand. The indebtedness in the second count, if any (which the defendant does not admit), was originally the joint indebtedness of the defendant's testate, John W. Graves, and Henry H. Fuller. A suit was formally brought by the plaintiff, for this identical demand against Graves and Fuller, in the lifetime of Graves.

Upon the death of Graves, during the pendency of the suit in court, the plaintiff discontinued against Graves, and prosecuted his suit to final judgment against Fuller alone as the survivor of the joint debtors. On trial by jury, verdict and judgment were in favor of Fuller, the defendant, who obtained judgment for costs, which have been paid on execution.

A suit for the identical demand sought to be recovered in the first count was formerly brought by the plaintiff against John W. Graves in his lifetime. After suit brought and after the death of Graves, the plaintiff by order of court, on motion, summoned Henry H. Fuller into court as a joint debtor, contractor and defendant, with Graves, alleging that he was such in his motion to summon him in. Fuller was thus joined as a joint debtor and defendant with Graves. Graves dying pending the suit in court, the plaintiff discontinued as to Graves and prosecuted his suit to trial, verdict, and judgment against Fuller alone as the surviving joint debtor. The ground of procedure against Fuller, through trial and up to final judgment, was, that he was a joint contractor and debtor with Graves, and the trial was conducted on that ground. Verdict and judgment were in favor of the defendant, Fuller, who obtained a judgment for costs against the plaintiff, which has been paid on execution.

Upon these facts Putnam, J., ruled that the action could not be maintained, and ordered judgment for the defendant. The plaintiff appealed.

C. Cowley, *pro se*.

G. Stevens for the defendant.

GRAY, C.J. In order to maintain an action on a joint contract, whether the action is brought against one or against both of the joint contractors, it is necessary to prove the liability of both ; for if one only is or ever was liable, there is not a joint, but only a several liability, and a variance from the cause of action declared on. For example, if one joint contractor is sued alone, and does not plead in abatement the non-joinder of the other, the judgment is rendered against the one sued, it merges the cause of action against him, and (unless otherwise provided by statute) as the two are no longer jointly liable, prevents a subsequent recovery against the other joint contractor. Ward *v.* Johnson, 13 Mass. 148 ; King *v.* Hoare, 13 M. & W. 494 ; Mason *v.* Eldred, 6 Wall. 231. So if, in such an action, the judgment is for the defendant, upon the ground that there is no joint liability, it is a bar to a subsequent action against the other contractor upon the joint contract. Phillips *v.* Ward, 2 H. & C. 717.

The same rule must be applied to this case. It is true that, by reason of the death of one joint contractor, and the provision of the Gen. St.., ch. 97, § 28, enabling an action to be maintained against his administrator as if the contract had been originally joint and several, the plaintiff might maintain one action against the survivor, and another against the administrator of the deceased. Curtis *v.* Mansfield, 11 Cush. 152 ; New Haven and Northampton Co. *v.* Hayden, 119 Mass. 361. But the severance is merely for purposes of remedy, and the plaintiff must still, in either action, prove that the original liability was joint, and that, so far as concerns that question, both the survivor and the administrator of the deceased are liable.

This action against the executor of Graves cannot be maintained upon the ground that Graves and Fuller were originally jointly liable, because such liability is disproved by the judgments in favor of Fuller in the former actions, one at least of which is shown by the statement of facts to have been prosecuted against Graves and Fuller in the lifetime of both, and both of which were prosecuted against Fuller, after the death of Graves, solely upon the ground of a joint liability.

It cannot be maintained upon the ground that Graves was originally the sole debtor, because, as to one count, it is admitted that the original liability, if any, was joint ; and, as to the other count, the plaintiff in the former action treated the liability as joint, and there are no facts tending to show that it was several.

Judgment for the defendant.

THE PEOPLE, FOR USE OF OLIVER MILLER ET AL., *v.* DEMPSEY HARRISON, ADMINISTRATOR.

IN THE SUPREME COURT OF ILLINOIS, JUNE TERM, 1876.

[*Reported in* 82 *Illinois* 84.]

APPEAL from the Circuit Court of Clay County ; the Hon. James C. Allen, J., presiding.

Rufus Cope for the appellant.

W. B. Cooper and *Hitchcock* & *Finch* for the appellee.

CRAIG, J , delivered the opinion of the Court :

Abraham Miller was appointed guardian of certain minors in Clay County, and to secure the faithful discharge of his duties

he entered into a joint and several bond with Joseph Maxwell and Solomon Miller as his sureties.

Subsequent to the execution of the bond, and after a default on the part of the guardian to comply with the terms and conditions thereof, Maxwell died. A suit was instituted upon the bond against the guardian, Solomon Miller, one of the sureties, and the administrator of the estate of Maxwell. Service was had upon Miller and the administrator, but the suit was dismissed as to the latter, and judgment rendered against Solomon Miller.

The judgment not having been paid, a claim was presented in the county court for allowance, against the estate of Maxwell. From the decision of the county court an appeal was taken to the Circuit Court, where a trial was had, in which the Court denied the allowance of the claim, upon the ground that the former action against the guardian and surety upon the bond, which resulted in a judgment against the surety, was a bar to a recovery in this proceeding against the estate of Maxwell.

It may be regarded as well settled, that a recovery against one of several persons, who are jointly liable for the payment of a debt or the discharge of a legal liability, releases the others, and forms a complete bar to a recovery at law against them. Wann *v.* McNulty, 2 Gilm. 355 ; Thompson *v.* Emmert, 15 Ill. 415 ; Moore *v.* Rogers, 19 Ill. 347 ; Mitchell *v.* Brewster, 28 Ill. 163.

But the question presented by this record arises not upon a joint contract, but the obligation is both joint and several, and hence the rule in relation to a joint undertaking does not apply.

Contracts which are joint and several may be regarded as furnishing two distinct remedies : one by a joint action against all the obligors, the other by a several action against each. Freeman on Judgments, § 335. If this be correct, an action against all the obligors on the joint liability would not be a bar to an action against each one on the several liability.

As was held in Moore *v.* Rogers, *supra*, where the contract is joint and several, its legal effect is double, equivalent to independent contracts founded upon one consideration, for performance severally and also for performance jointly ; and distinct remedies upon the same instrument, treating it as a joint contract and as a several contract, may be pursued until satisfaction is fully obtained.

The bond executed by Maxwell was a several contract on his part, upon which he could have been sued alone in his lifetime, and after his death the obligation remained as a valid legal claim against his estate.

But even if it was true the plaintiff, by instituting suit against two of the makers of the bond as a joint obligation, and obtaining judgment against one, could only proceed in equity to obtain satisfaction from the estate of the deceased, yet, under the authority of Moore *v.* Rogers, *supra*, the plaintiff had a clear and undoubted right to have the claim allowed against the estate.

As the Court erred in refusing to allow the claim upon the proofs, the judgment will be reversed and the cause remanded.

Judgment reversed.

WEGG PROSSER *v.* EVANS.

IN THE COURT OF APPEAL, NOVEMBER 1, 1894.

[*Reported in Law Reports*, 1 *Queen's Bench* (1895) 108.]

APPEAL from the judgment of Wills, J., at the trial without a jury.[1]

The action was upon a guarantee. The facts were as follows: The defendant had jointly with one Thomas guaranteed to the plaintiff due payment of the rent of a farm let by the plaintiff to one Williams. Default being made by Williams in payment of a half-year's rent, an application for such rent was made to Thomas by the plaintiff's agents, to whom Thomas gave his check for the amount. The check being dishonored, the plaintiff brought an action against Thomas on the check in which he recovered judgment. Execution was issued on the judgment, but it was not satisfied. The plaintiff then brought the present action against the defendant upon his guarantee. The learned judge at the trial gave judgment for the plaintiff.

J. E. Bankes and *Æ. Mackintosh* for the defendant.

A. T. Lawrence for the plaintiff.

LORD ESHER, M.R. In this case the plaintiff was the owner of a farm which he had let, and, being doubtful of the tenant's ability to pay his rent, he took a guarantee from the defendant and one Thomas that the rent would be paid. The guarantee was joint, not joint and several. The tenant did not pay rent that was due; and thereupon the guarantee became effective, and the plaintiff had a right of action upon it. That action ought, no doubt, to be a joint action against both of the guarantors. If in such a case an action were brought against one of the two joint contractors only, he might, under the old

[1] 1894, 2 Q. B. 101.

system, have pleaded in abatement, and so enforced the joinder of the other ; and since the Judicature Act, pleas in abatement having been abolished, the same result could be brought about by an application for an order to enforce joinder of the other joint contractor. The plaintiff, however, did not at that time bring an action against the guarantors or either of them. He took a check for the amount of the rent due from Thomas. By so doing he did not give time to the principal debtor, or do any injury to the present defendant. The check was not by itself a satisfaction of the debt. It was given by way of what has been styled a conditional payment. If the check had been paid, it woud have been payment of the debt on the guarantee, and that payment would have no doubt prevented the plaintiff from suing the defendant. The defendant would thereupon have become liable to an action by Thomas for contribution ; but no additional expense would be occasioned to him through the giving and payment of the check, and his position would not be altered thereby in any way. But the check was dishonored, and Thomas did not pay it. Thereupon the plaintiff sued him upon the check. The cause of action in that action was the dishonor of the check, and upon that the plaintiff recovered judgment. If that judgment had been satisfied, and the plaintiff had obtained the fruits of it by execution, that would have been equivalent to payment of the debt on the guarantee ; but it has not been satisfied. The present defendant has not been in any way injured by the transaction with regard to the check. He would not be liable to bear any of the costs of the action upon it, nor is his position altered for the worse in the smallest degree. All that has happened, so far as he is concerned, appears to be that probably he has not been called upon to pay under the guarantee so soon as he otherwise might have been. It is contended, nevertheless, that the rule of law on the subject is that by reason of this transaction with regard to the check which took place between the plaintiff and Thomas, and which did not prejudicially affect the defendant in any way, the plaintiff cannot now sue the defendant on the guarantee. To my mind, if the rule were as alleged, it would be a technicality of the most stringent kind, and one which would make the law on the subject contrary to the justice and truth of the matter. I for one object to such a technicality, and will not act upon it, unless I am obliged to do so by authority. If I were bound by the authority of decided cases, of course I should bow to that authority ; but we ought, I think, to look very closely at the cases on the subject to see whether we are bound by authority

to hold that there is such a technical rule as is suggested. It is no doubt the law that, if the plaintiff had sued Thomas alone on the guarantee and not on the check, and had recovered judgment against him, he could not afterward have sued the present defendant. If that had been the case here, I should have been bound by a technical rule of law which has existed so long that I must bow to it. But in the present case the plaintiff did not sue Thomas on the guarantee, but on the check. Is there any case which decides that, where a judgment is recovered against one of two joint contractors, not on the original contract, but on a check given by him as this was, the action against the other joint contractor is barred? The case of Drake *v.* Mitchell[1] appears to me to be absolutely to the contrary effect. That was decided by four judges who were eminently well acquainted with the common law of England and with business. Lord Ellenborough, C.J., said in that case: "I have always understood the principle of transit *in rem judicatam* to relate only to the particular cause of action in which the judgment is recovered operating as a change of remedy from its being of a higher nature than before. But a judgment recovered in any form of action is still but a security for the original cause of action, until it be made productive in satisfaction to the party; and therefore till then it cannot operate to change any other collateral concurrent remedy which the party may have." Anything plainer than these expressions there cannot be. In this case no judgment had been recovered against Thomas in respect of the particular cause of action on which the defendant is sued, viz., the breach of the guarantee. Thomas was not sued upon that cause of action, but on another, viz., non-payment of the check. But it was said that Cambefort *v.* Chapman[2] was to the contrary effect. I do not think it can be denied that that case conflicts with Drake *v.* Mitchell.[3] That being so, the question is which we ought to follow. The decision in Drake *v.* Mitchell[4] was given in 1803, and has stood from that time till 1887, when Cambefort *v.* Chapman[5] was decided. I think that that alone is a ground for giving a preference to the older decision; but from what I have said it will be obvious that my judgment goes with that decision and not with the later one. Therefore I think we should follow the decision in Drake *v.* Mitchell,[6] unless there is some authority binding upon this Court by which it has been overruled. I do not think there is any such authority. I do not think that the House of Lords intended by their judgment in Kendall *v.* Ham-

[1] 3 East, 251.
[2] 19 Q. B. D. 229.
[3] 3 East, 251.
[4] *Ibid.*
[5] 19 Q. B. D. 229.
[6] 3 East, 251.

ilton[1] to overrule the decision in Drake *v.* Mitchell.[2] The defendant not being prejudiced in any way by what took place with regard to the check, in my view of the case it could only be some mere technical rule of law that could produce what to my mind would be the unjust result of releasing the defendant from liability upon his contract; and there is, in my opinion, no authority which obliges me to say that there is such a rule of law. It was said that the defendant had a right to have Thomas joined as a co-defendant in the action, and that he could not have him joined because of what took place with regard to the check. But it appears to me that the hypothesis on which this argument is based is incorrect. It follows from what I have said that the defendant, if he thought it worth his while, had a right to call on the plaintiff to join Thomas; and Thomas could have made no valid objection to being joined, nor the plaintiff to joining him. I think that this case is governed by the decision in Drake *v.* Mitchell,[3] and that Cambefort *v.* Chapman[4] was wrongly decided. For these reasons I think that the appeal should be dismissed.

Appeal dismissed.[5]

RICHARDS AND ANOTHER *v.* HEATHER.

IN THE KING'S BENCH, MICHAELMAS TERM, 1817.

[*Reported in* 1 *Barnewall & Alderson* 29.]

ASSUMPSIT for work and labor. The declaration contained only one set of counts charging the defendant in his own right. Plea, *non assumpsit*. At the trial before Abbott, J., at the last spring assizes for the county of Southampton, the plaintiff proved two distinct demands: one due from the defendant individually, the other in respect of work done upon a ship, which had belonged to the defendant and one Rous, who had, jointly with the defendant, given directions for the work, and who was dead at the time of action brought. The learned judge entertaining a doubt, whether in respect of this last demand, the defendant should not have been charged as surviving partner, directed the jury to find a verdict for the whole sum claimed, with liberty to the defendant to move to reduce it to the amount of the first demand only, if the Court should be of that opinion. Accordingly Pell in Easter Term last obtained a rule *nisi* for that purpose, and now

[1] 4 App. Cas. 504. [2] 3 East, 251. [3] *Ibid.* [4] 19 Q. B. D. 229.

[5] The concurring opinions have been omitted—ED.

Gaselee and *A. Moore* showed cause.

Pell, contra.

LORD ELLENBOROUGH, C.J. I am of opinion that the plaintiff is entitled to both the sums which he seeks to recover under this declaration. It would be more convenient in all cases, where a debt accrues from the defendant as surviving partner, to declare against him accordingly, because it is convenient to make the forms of declaration subservient to the information of the party charged ; but it is not essentially necessary to the maintenance of the action, for where there are several partners who are living, one of them may be declared against as the sole debtor, and the only objection to this mode of declaring is, that the plaintiff is liable to be turned round by a plea in abatement. But inasmuch as where the other partner is dead, there cannot be any plea in abatement, *cessante ratione, cessat lex.* The reason which requires that the demand shall be stated, as a joint demand ceases when the plea in abatement can be no longer pleaded. It seems to me, therefore, that the plaintiff may maintain his action, as well for the demand, for which the defendant was liable individually, as for that for which he was liable jointly with the other partner, who is now dead. According to every principle of law, the joint debt may, by reason of the death of the party, be now treated as if it had been originally a separate debt. I think, therefore, there is not any occasion to make any distinction in the declaration on account of the sources from which the debts originally sprung.

ABBOTT, J. I am of the same opinion. The question was reserved in consequence of a doubt suggested by me upon the form of the declaration, and my doubt was whether it was not necessary to charge the defendant, as surviving partner, in respect of the last demand. My doubt did not arise in respect of there being evidence given of two distinct demands, but in respect of the form of the declaration, as applicable to the last demand. It is possible that I may have had an indistinct recollection of what fell from the Court in Spalding *v.* Mure, but I now think that the doctrine there laid down is not law. By the law of England, where several persons make a joint contract, each is liable for the whole, although the contract be joint. In Whelpdale's Case[1] the plaintiff had declared on a bond made by the defendant, to which the defendant pleaded *non est factum ;* the jury found that the bond was a joint bond made by the defendant and another to the plaintiff, and upon this special verdict it was adjudged by the Court that the plaintiff should recover, "because when two men are jointly bound

[1] 5 Rep. 119.

in one bond, although neither of them is bound by himself, yet neither of them can say that the bond is not his deed, for he has sealed and delivered it, and each of them is bound in the whole." That was a case upon a deed, but Rice *v.* Shute was a case upon a simple contract, and it was there held that although the promise was a joint promise, yet the defendant who was sued alone could not say that he did not promise, and that the only way of taking advantage of the omission of the other joint contractor was by plea in abatement. These two cases establish this, that proof of a joint contract is sufficient to sustain an allegation that one contracted, and, therefore, there is no variance ; and if not, then the proof given in this case was competent to sustain the declaration in respect of both demands, and this rule must be discharged.

Rule discharged.[1]

WILLIAM WHITE AND ANOTHER, APPELLANTS, *v.* TYNDALL AND OTHERS, RESPONDENTS.

IN THE HOUSE OF LORDS, MARCH 19, 1888.

[*Reported in Law Reports* 13 *Appeal Cases* 263.]

APPEAL from a decision of the Court of Appeal in Ireland, upon a demurrer.[2]

The statement of claim contained the following allegations :

By an indenture of lease made in January, 1842, Pope demised to George White and Albert White, "their executors, administrators, and assigns," a piece of ground in Waterford on which was "erected a large corn store" and some houses, with liberty for George White and Albert White, "their executors, administrators and assigns, their servants and workmen, their horses, cars, carts, and other conveyances to use and enjoy" a certain road ; reserving to the lessor liberty to pass and repass through the demised premises, the lessor doing no wilful damage to the demised premises or to the property or effects "of the said George White and Albert White, their executors, administrators, or assigns."

To have and to hold the premises "unto the said George White and Albert White, their executors, administrators, and assigns as tenants in common and not as joint tenants" from March 25th next for the term of sixty-eight years, "they, the

[1] The opinions of Bayley and Holroyd, JJ., have been omitted—ED.

[2] 20 Law Rep. Ir. 517.

said George White and Albert White, their executors, administrators, and assigns," yielding and paying the yearly rent of £150 by equal half-yearly payments.

The covenants to pay rent and repair were as follows :

" The said George White and Albert White do hereby for themselves, their executors, administrators, and assigns covenant, promise, and agree to and with the said Richard Pope, his executors, administrators, and assigns in manner and form following—that is to say, that they, the said George White and Albert White, or some or one of them, their executors, administrators, or assigns, shall and will, from time to time, and at all times during the term hereby demised well and sufficiently satisfy, content, and pay unto the said Richard Pope, his executors, administrators, or assigns the said hereinbefore reserved yearly rent, upon the days and times herein reserved for the payment thereof, clear above all taxes as aforesaid (quit rent and crown rent only excepted) according to the true intent and meaning of these presents.

" And shall and will during the continuance of the term hereby demised well and sufficiently support, maintain, and keep the said premises hereby demised and all improvements made and to be made thereon in good and sufficient tenantable order, repair, and condition, and at the end, expiration, or other sooner determination of this demise shall and will so leave and yield up the same in the like good sufficient tenantable order, repair, and condition."

George White died in January, 1883, and the defendants in this action were Albert White and the executors of George White.

The lessor's estate having become vested in the plaintiffs (the respondents in the present appeal), they claimed one year's rent due on September 29th, 1885, and damages for breach of the covenant to repair.

Albert White (the surviving lessee) suffered judgment by default.

The executors of George White by the second paragraph of their statement of defence alleged as to the claim for rent that before the rent of the half year ending September 29th, 1884, became due they, by deed in March, 1884, assigned to one Anthony the undivided moiety and all other their estate and interest in the premises for the unexpired residue of the term, and gave the plaintiffs notice thereof, and afterward paid the half year's rent due on September 29th, 1884, being the gale day next following the serving of the notice.

By the fourth paragraph they alleged that from the time

when they became possessed of the premises up to the gale day next after giving the above-mentioned notice they performed the covenant to keep in repair.

The plaintiff having demurred to the second and fourth paragraphs, the Common Pleas Division (Morris, C.J., and Harrison, J.), being of opinion that the covenants were joint and not several, overruled the demurrer.[1]

The Court of Appeal in Ireland (Lord Ashbourne, L.C., and FitzGibbon and Barry, L.JJ.) reversed that decision and allowed the demurrer.[2]

Against this decision the defendants appealed.

Horace Davey, *Q.C.*, and *Finlay*, *Q.C.* (*M. J. Druitt* with them); for the appellants.

F. Meadows White, *Q.C.*, and *G. R. Price* (of the Irish Bar) for the respondents.

LORD HALSBURY, L.C. My Lords, I have had an opportunity of reading the opinion which is about to be delivered by my noble and learned friend on my right (Lord FitzGerald). I entirely concur in it, and have but a very few words of my own to add.

In this case the whole question turns upon whether the language of the covenant on the part of the lessees of a holding to pay rent and keep in repair is joint or several, and no question has been raised, or indeed can be, that following one unbroken series of authorities the language used would make a joint covenant.

The late Mr. Platt, on page 117 of his work on Covenants, published more than half a century ago, puts the proposition in words that have never been questioned, as far as I am aware, since his time. With respect to the form he says: "No particular words are necessary to constitute a covenant of either kind" (that is to say, either joint or several). "If two covenant generally for themselves, without any words of severance, or that they or one of them shall do such a thing, a joint charge is created, which shows the necessity of adding words of severalty where the covenantor's liability is to be confined to his own acts." See May *v.* Woodward;[3] Robinson *v.* Walker.[4]

FitzGibbon, L.J., does not, as I understand, doubt that the language of the covenant would show a joint covenant but for the fact that the demise was to the two lessees as tenants in common. But I confess that I am unable to follow the distinction which the learned judge draws to the conclusion at which he arrives. It is true that the parties to whom the demise is

[1] 18 Law Rep. Ir. 263.
[2] 20 Law Rep. Ir. 517
[3] Freem. 248.
[4] 1 Salk. 393.

made are to hold it as tenants in common, but what they covenant to do is to pay one rent, not two rents, and not each to pay half a rent, but one rent.

The same answer may, I think, be given to Barry, L.J.'s, somewhat quaint illustration. To the argument implied in his illustration the answer is obvious ; the wigs are many, but here the rent is one. I think it is hardly accurate to say that the word "their" is an ambiguous word. Its grammatical force is of course like that of other pronouns, and its application must be ascertained from the context.

I am therefore of opinion that the judgment of the Common Pleas Division should be restored, and the judgment of the Court of Appeal reversed, and I move your Lordships accordingly.

LORD FITZGERALD. My Lords, this appeal is from an order of the Court of Appeal in Ireland of February 21st, 1887, reversing a decision of the Common Pleas Division.

The action was on covenants contained in a lease dated January 21st, 1842, made by Richard Pope to George White and Albert White, of a corn store and premises in the liberties of the city of Waterford, for a term of sixty-eight years at a rent of £150.

The plaintiffs in the action were Tyndall and several others, to whom the estate and reversion of Pope had come, and the defendants were Albert White, the surviving lessee, and the executors of George, his co-lessee, who had died in January, 1883. The writ of summons was issued on December 18th, 1885. The rent claimed by the plaintiffs was for the year ending September 29th, 1885. The plaintiffs also claimed a considerable sum on the covenant for keeping in repair. The defendant Albert White did not defend the action. The other defendants (executors of George, the deceased lessee) put in several defences to each portion of the demand of the plaintiffs, to which there was a reply and a demurrer.

It is not necessary to refer further to the pleadings, as eventually the question which arose was whether the statement of claim disclosed a cause of action against the defendants (executors of George) for breaches of covenant occurring after his death.

The question is whether the covenants of the lessees were joint covenants only, or were the several covenants of each of the lessees with the lessor. The plaintiffs alleged that the covenants were to be interpreted as several. The executors maintained the contrary.

The question thus raised is one of construction of the cove-

nants, but in considering that question we have to look at and consider the whole instrument. The judgment of the Common Pleas Division, as delivered by Morris, L.C.J., is very short and goes directly to the real point. The Lord Chief Justice states his view that the words of the covenant in clear and unambiguous language express a joint covenant, and he adds: "In Levy *v.* Sale,[1] where it was argued that a similar covenant, though in form joint only, should be construed, according to the rules of equity as joint and several, Lush, J., says: 'The authorities I find are uniform in holding that where there was no antecedent separate liability, but the obligation exists only by virtue of a joint covenant, the extent of its operation is measured by the words used, and the construction was the same in equity as at law.' That case would be identical with the present, except that here the demise is to the two lessees as tenants in common. But the covenant to pay rent, if plainly a joint covenant only, cannot be treated as several by reason of the interest taken by the lessees. The covenant is, in my opinion, a joint covenant. The demurrer must therefore be overruled."

That judgment came before the Court of Appeal and was reversed, the Lord Chancellor of Ireland, who presided, observing that "in the case of Sorsbie *v.* Park,[2] Parke, B., thus stated the rule: 'A covenant will be construed to be joint or several according to the interest of the parties appearing upon the face of the deed if the words are capable of that construction; not that it will be construed to be several by reason of several interests if it be expressly joint.' I do not think that the words of the covenant here are so clear and unambiguous as to exclude regard being had to the interest of the covenantors in the property. If, in the words of Parke, B., the covenant was 'expressly joint' it should be so construed, but I do not hold the words of the covenant to be clear in the present case. Therefore, recognizing the rule to the fullest extent, I apply it differently from the method adopted in the Common Pleas Division. I accordingly, although not without doubt, construe the covenant as a several as well as a joint covenant, and the executors of the deceased covenanter remain liable to pay the rent and to repair." We should find much difficulty in concurring in that judgment.

The case and the numerous authorities cited were discussed by FitzGibbon, L.J., very learnedly, but we do not think it necessary to follow the criticisms of the learned judge. He concludes thus, after reading the language of Lush, J., in

[1] 37 L. T. (N. S.) 709. [2] 12 M. & W. 158.

Levy *v.* Sale :[1] "A proposition which we do not question ; but the observation of the Lord Chief Justice upon that case in the judgment appealed from shows exactly the error of the decision, for he says, 'That case would be identical with the present except that here the demise is to the two lessees as tenants in common.' That is the very distinction which makes all the difference and requires us to hold that the covenant following the interests of the parties, the demurrer must be allowed."

The reasons for the decision of the Court of Appeal were, therefore, as it appears : First, that the language of the covenant was ambiguous ; and, second, that in such case the demise to the lessees "as tenants in common" made all the difference, and established error in the judgment of the Court of Common Pleas.

I now proceed to examine the language and provisions of the lease which we have to construe. We may dismiss at once the supposition that the lessees were copartners in trade, and acquired the leasehold as such. It may have been so, but that it was so is mere conjecture. Nor can we give any weight to the argument drawn from the use of the word "their" in the reservation of the right of way to the lessor. The inference from the lease is that the lessor was sole owner and entitled to a single reversion in the whole, and as it does not appear that the lessees had any previous connection with the premises, there is no ground to suppose that there was any antecedent liability.

The habendum is "to the said George White and Albert White, their executors, administrators, and assigns, as tenants in common, and not as joint tenants," and the reddendum is "yielding and paying therefor and thereout yearly and every year during the term to the lessor, his executors, administrators, or assigns, the yearly rent of £150." It may be observed that if an action had been instituted on the reddendum, it should *prima facie* have been against the two jointly or the survivor.

The rent then so reserved and payable is a single rent, payable to one individual (the lessor) in one sum by the two lessees. In case of any part of the rent being in arrear the lessor's right of distress and power to re-enter fasten on the whole premises.

There are other provisions in the lease to which it is not necessary to refer, and which may be passed by with one observation, that they all import, or at least are consistent with, a single obligation by the lessor to both lessees, a joint obligation on the part of the lessees toward the lessor.

[1] 37 L. T. (N. S.) 709.

The covenants in question are as follows : [His Lordship read the covenants set out above.]

The lien of these covenants, as well as the words of obligation, unquestionably import joint covenants, and it was not contended that the words "or some or one of them" could have the effect of making obligations several, which without them would be joint. The authorities are all the other way.

It has not been made apparent to us that there was any ambiguity in the language of these covenants, and indeed the counsel for the respondents admitted that if these covenants stood alone and uncontrolled by anything else in the instrument, they were free from ambiguity, and were in form joint obligations, and should be so interpreted ; and being asked on what he relied as coercing us to depart from the words of the instrument and interpret that which was in form and language the joint covenant of the two lessees as being the separate covenant of each, in reply he pointed to the words of the habendum, "as tenants in common and not as joint tenants," as giving severally the undivided interest to the lessees coupled with unity of possession.

The question we have to consider is whether that provision inserted in the habendum, with the apparent purpose of preventing what might be the evil of survivorship as between the lessees, has or ought to have the effect of converting a covenant made by the lessees jointly with the lessor into the separate covenant of each.

The grant was in form joint, and though the words "as tenants in common and not as joint tenants" are found in the tenendum, they are immediately followed by a reddendum joint in form and creating *prima facie* a joint obligation. No authority was cited on the effect of these words as determining or affecting any right of the lessor, but it was suggested that their effect as between the lessees was to prevent *inter se* the right of survivorship, and that therefore we should construe the covenants, though in terms expressly joint, as the several covenants of each.

The current of modern decision has been, as we think it ought to be, to adhere to the very words of the contract when they are plain and unambiguous, and not to depart from them on grounds of hardship or inconvenience. The contract in such cases represents in its language the intention of the parties, and if they intended otherwise they should have said so. We ought to hold ourselves bound by the express and unambiguous covenant before us, unless coerced by authority to put on it a different construction from that which its words import.

The argument was that we should mould the covenant of the lessees because of their separate interests in the subject-matter of the grant, but no decision has been cited going so far. The passage cited from Platt (page 123) is expressed "shall be measured and moulded according to the interests of the covenantees." No decision to which we were referred goes beyond that.

Slingsby's Case[1] dealt with the several interests of the covenantees, and the illustration put by the Court to some extent shows the reason of the rule in the case of covenantees, and so the rule in Eccleston *v.* Clipsham[2] is confined to the interest of the covenantees; and the paragraph in the Touchstone, ch. 7, page 166 (Atherley's edition), founded on Slingsby's Case, is to the same effect. There are reasons for the rule applicable to separate interests in the covenantees as regulating the right and the form of suit on the covenant, but no authority has been brought under our notice that the rule was applicable to the case of separate interests in covenantors.

The counsel for the appellants was asked whether he had been able to find any decision applying the rule to the latter case, and he informed us he had not. We do not mean to say that there may not arise cases in which the entirely separate interests of the lessees would render it necessary, in the interests of all parties, to interpret covenants differently from their express words. This is not such a case.

The argument of hardship on the plaintiffs, if the covenants in question are to be considered as joint only, was of course urged. It probably is the case that the advantages which a joint covenant originally afforded to the lessor are now more than counterbalanced by the disadvantages which, under altered circumstances, now beset the assignees of his estate; but that cannot affect our decision, and the plaintiffs are not without remedies. They may distrain and they may evict. Their rights as reversioners are only interfered with as to an action on the covenants in question.

My Lords, I have, on the whole, come to the conclusion that the covenants in question are free from ambiguity, and are in their language and form joint and not several; that there is nothing on the face of the instrument to warrant us in putting on the covenants any other construction than that which their language imports, and consequently that the decision of the Court of Appeal should be reversed, and the judgment of the Common Pleas Division restored.

Order appealed from reversed; order of the Common Pleas

[1] 5 Rep. 18*a*. [2] 1 Saund. 153.

Division in Ireland restored ; the respondents to pay to the appellants the costs both in this House and below, and also to repay to the appellants the costs paid to them by the appellants ; cause remitted to the Queen's Bench (late Common Pleas) Division in Ireland.

Lords' Journals March 19th, 1888.[1]

[1] The concurring opinions of Lords Herschell and Watson have been omitted.—ED.

CHAPTER V.

CONTRACTS PERFORMABLE IN THE ALTERNATIVE.

LAYTON *v.* PEARCE.

In the King's Bench, Michaelmas Term, 1778.

[*Reported in* 1 *Douglas* 15.]

By the Lottery Act of 1777 (17 Geo. 3, ch. 46) a penalty of £500 was given to be recovered in a *qui tam* action against any person "who should receive any money whatsoever in consideration of repayment of any sum or sums of money, in case any ticket or tickets in the said lottery should prove fortunate, or in case of any chance or event relating to the drawing of any ticket or tickets in the said lottery, either as to the time of such ticket or tickets being drawn, or whether such ticket or tickets should be drawn fortunate or unfortunate." This was an action upon that statute against a lottery office keeper. The declaration contained three counts. The first stated that the defendant had received £1 6*s.* from one Robert Griffin, in consideration of repaying the value of an undrawn ticket if the above number should be drawn on the ensuing day. The second, that he had for the like sum and in the like event undertaken to deliver an undrawn ticket. The third only differed from the first, in stating the stipulation to have been to pay a precise sum (of £20) on the like event, and in following more accurately the words of the statute. The agreement proved at the trial was in the alternative—viz., that Griffin had paid to the defendant £1 6*s.* on condition that if the ticket No. 37,733 in the lottery then drawing should come up, either a blank or prize on the ensuing day, he (the defendant) would either deliver to Griffin an undrawn ticket or pay him £20. He had not, in fact, done the one thing or the other. The cause was tried before Lord Mansfield, at Guildhall, and, a verdict having been found for the plaintiff, Dunning moved for a rule to show cause why it should not be set aside, and a nonsuit entered. 1. Because the agreement proved did not

correspond with that stated in any one of the three counts in the declaration. 2. Because the agreement as proved would not maintain the action, for that, being optional, it was not within the provisions of the statute.

The rule was granted, and the *Solicitor General* and *Lane* showed cause.

Dunning and *Davenport* on the other side.

LORD MANSFIELD. We are of opinion that, if the option had been in the insured, and if he had made his election to take the £20, the contract would have been sufficiently stated, because he would thereby have converted the agreement into an absolute contract for the payment of money, and then the other part of the alternative in the original bargain would become surplusage. In an action on the statute of 2 Geo. 2, ch. 24, against bribery, the act of bribery laid was the corrupting a voter to give his vote for Mr. Lockyer and the Earl of Egmont, and the evidence was, that the contract was to vote for Mr. Lockyer and his friend. The Court held that by that part of the transaction by which the voter was corrupted to vote for Mr. Lockyer, the offence was complete, and that the rest was surplusage and needed not to be proved. But though the practice may be that the insured shall have the option in point of law, the person who is to perform one of two things in the alternative has the right to elect. This has been established by a variety of cases. The present action, therefore, cannot be supported.

Judgment of nonsuit.

PLOWMAN & McLANE *v.* RIDDLE.

IN THE SUPREME COURT OF ALABAMA, JANUARY TERM, 1845.

[*Reported in* 7 *Alabama* 775.]

ERROR to the County Court of Talladega.

Assumpsit by the defendant against the plaintiffs in error. The plaintiff declared on a promissory note for $300.

McLane appeared and pleaded *non assumpsit*, failure of consideration, want of consideration, payment, set-off, and a special plea, that by the note it was provided that it might be discharged in good leather, one third in sole leather, at 30 cents per pound, one third in skirting and harness leather, at 37½ cents per pound, and the other third in upper leather, priced in proportion to the sole and harness leather, and averred, that at the

maturity of the note, he and the said Plowman were ready at their tan yard, and had a sufficient quantity of the kinds of leather mentioned in the note, to have discharged it according to its terms, and have ever since had at their tan yard a sufficient quantity of the kinds of leather mentioned in the note, to have discharged it according to its terms, and that he was, at the maturity of the note, and has ever since been, ready and willing to discharge the note according to its terms.

The plaintiff took issue upon the second, third, fourth, and fifth pleas. To the first he replied that Plowman & McLane did assume, in manner and form, as in the declaration is alleged, and this he is ready to verify.

To this replication the defendant, McLane, rejoined that he did not assume, in manner and form as the plaintiff in his declaration, and in his replication had alleged, etc.

The plaintiff demurred to this rejoinder, and also to the sixth plea, which were both sustained by the Court.

Upon the trial upon the issues the plaintiff read his note as follows :

"On or before December 25th, 1843, we promise to pay Alexander Riddle or bearer the sum of $300, which may be discharged in good leather, one third in sole leather at 30 cents per pound, one third in harness or skirting leather, at 37½ cents per pound, and the other third in upper leather, price in proportion to the sole and harness leather, value received, this February 18th, 1842.

"PLOWMAN & McLANE."

The defendant proved a dissolution in the summer of 1843, and a notice of such dissolution to the plaintiff, and by a witness offered to prove all the facts alleged in the sixth plea, but on the plaintiff's motion the Court excluded the testimony and the defendant excepted. After the opening argument, and while the defendant's counsel was speaking the Court permitted the plaintiff to take a judgment by default against Plowman, to which the defendant objected, and moved the Court for a discontinuance, which was overruled and to which the defendant excepted.

These matters are separately assigned for error by both defendants.

Rice for plaintiff in error.

L. E. Parsons, contra.

ORMOND, J. The last plea sets up as defence to the action a condition of the contract that the sum of money for which it was made "may be discharged in good leather ; one third in

sole leather at 30 cents per pound, one third in harness or skirting leather, at 37½ cents per pound, and the residue in upper leather priced in the same proportion," and averred a readiness and willingness to deliver the leather at the maturity of the note.

In the case of McMurray *v.* The State, 6 Ala. Rep. 324, this Court considered, at some length, the law arising upon contracts to deliver ponderous articles, and it was held that upon a contract to deliver plank upon a day certain, it would be a defence to the action, if the defendant was ready, and willing to deliver at the time agreed upon in the contract. See also Thaxton *v.* Edwards, 1 Stewart, 524.

The defendant appears to have considered this contract, as in legal effect, a promise to deliver leather of the kinds specified to the value of $300, at a particular time, but that is clearly not the contract of the parties, which is to pay $300 at a particular time with a condition superadded, giving them the privilege of discharging it in leather at a specified price. This is clearly for their benefit, and it was their duty, if they elected to deliver the leather in discharge of their contract, to give notice to the plaintiff of their readiness and willingness to do so. Having omitted to do so, their contract to pay the money has become absolute, and they cannot, when sued for the money, defeat the action by proving the existence of a fact which was peculiarly within their own knowledge.

The injustice of this defence will be apparent when it is considered that the defendants were under no obligation to deliver the leather, and if it had risen in price, doubtless would not have delivered it, but would have paid the money; being then a condition inserted for their benefit, it was necessary that they should have given notice of their election to pay in leather. McRae *v.* Raser, 9 Porter, 122; Stewart *v.* Donnelly, 4 Yerger, 177; Church *v.* Feteran, 2 Penn. 301; Erwin *v.* Cook, 2 Dev. 183. From this examination it appears that the plea was bad, in not averring notice of an election to discharge the obligation in leather.

The defendant, McLane, had the undoubted right to plead separately, and having pleaded the general issue, the plaintiff replied to it that he did promise and assume in connection with Plowman, his then partner. To this the defendant rejoined that he did not assume, etc., reiterating his first plea, to which there was a demurrer, which the Court sustained. In this the Court undoubtedly erred. He had the clear right to plead separately, as was held by this Court in Beal *v.* Snedicor, 8 Porter, 523. We do not indeed perceive that the rejoinder

was necessary, inasmuch as the replication controverted the allegation of the plea, and added another immaterial fact, which, as it went to the form only of the pleading, might, under our statute abolishing general demurrers, be rejected as surplusage. The informal replication, however, superinduced the supposed necessity for the rejoinder, which was, in effect, merely taking issue on the replication and by the decision of the Court upon the plaintiff's demurrer, the defendant was effectually cut off from the benefit of his plea. For this error the judgment must be reversed and the cause remanded.

NORTON *v.* WEBB.

IN THE SUPREME JUDICIAL COURT OF MAINE, 1853.

[*Reported in* 36 *Maine* 270.]

ON exceptions from *nisi prius*, Rice, J., presiding.

Writ of entry.

The demandant conveyed a farm, lot No. 45, to the tenant, who at the same time re-conveyed it in mortgage. Upon this mortgage the action is brought. The condition of the mortgage was, "that if the said Farwell Webb, his heirs, executors, or administrators shall support me and Betsey Norton, my wife, in our house on said lot, No. 45, if we choose, by furnishing us with food and clothing, medicine and medical aid in sufficient quantity and quality, according to our circumstances, and as our necessities may require, and that during our natural life, both in sickness and health, as we may need for our comfort—also provide and constantly keep for our use and benefit, a good and gentle horse, and convenient carriage, or otherwise provide them whenever we, or either of us, as the case may be, shall wish to ride, either in visiting or for recreation, then this deed shall be void, otherwise remain in full force."

It appeared in evidence that demandant and wife lived in the family of tenant, on the farm described in said deed, for two years after it was given, when they left it, and had received no support since.

The tenant contended that he had the right, under the terms and conditions of the deed, to furnish the support contemplated, at the house on said farm; and if he furnished support at that place, it was not optional with demandant to have his support there or elsewhere, as he chose.

But the presiding judge instructed the jury that it was origi-

nally optional with the demandant to have his support in said house on the farm or elsewhere as he might choose. That if the demandant had elected to have his support in said house, he would be bound to receive it there and could not afterward revoke or alter it ; but if the plaintiff had not so elected, the defendant would be bound to support the plaintiff and his wife elsewhere ; and that the burden of proof was on the defendant to show that the plaintiff had elected to take his support in said house, and that the acts of the plaintiff in going to live on the farm, in the house with the defendant, were legitimate evidence tending to prove such election.

A verdict was returned for the demandant.

Morrell for tenant.

Vose for demandant.

SHEPLEY, C.J. The Court decided on a former occasion that the mortgagor might retain possession until there had been a breach of the condition, if the mortgagee had elected to receive support in the house upon the farm. 35 Maine, 218. During the last trial a question was presented, whether the mortgagor had the right to elect, where he would furnish support to the mortgagee and his wife if they had not elected to receive it upon the farm. The jury were instructed that he had not that right. That he would be bound to furnish it elsewhere at their request.

When one person engages to furnish support for another without a designation of any place where it should be furnished, many reasons might be offered in favor of a construction, authorizing the support to be furnished where the person providing it should elect, it being a suitable place. But a different construction has prevailed, requiring the support to be furnished, where the person to be supported should elect to receive it without occasioning unnecessary expense. Wilder *v.* Whittemore, 15 Mass. 262 ; Fiske *v.* Fiske, 20 Pick. 499 ; Flanders *v.* Lamphear, 9 N. H. 201 ; Holmes *v.* Fisher, 13 N. H. 9.

The instructions given appear to have been in conformity to this construction of the contract.

TENNEY, APPLETON, and CUTTING, J.J., concurred.

Exceptions overruled.

THORN *v.* CITY RICE MILLS.

IN THE SUPREME COURT OF JUDICATURE, JANUARY 11, 1889.

[*Reported in Law Reports*, 40 *Chancery Division*, 357.]

THE plaintiff was the registered holder of a debenture issued by the defendant company to secure payment of £1500 on May 28th, 1890, with interest in the mean time at the rate of 6 per cent per annum, payable half yearly, on May 28th and November 28th. The property of the company, including £1660 uncalled capital, was charged by the debenture with payment of principal and interest.

The debenture was issued subject to certain conditions endorsed thereon, of which the following were two :

"1. If the company makes default for a period of fourteen days in payment of any interest hereby secured, the principal moneys hereby secured shall immediately become payable."

"4. The principal moneys and interest hereby secured will be paid at the Royal Exchange Bank, Limited, No 126 Cannon Street, London, or at the registered office of the company."

All interest that became due on the debenture down to and including the interest that became due on April 28th, 1888, had been paid ; it had always been paid by checks sent by the secretary of the defendant company to the plaintiff. But the interest due on November 28th, 1888, was not paid, the secretary had not sent a check for it, and the plaintiff had made no demand for it either at the Royal Exchange Bank or the offices of the defendant company ; and the writ was issued on December 17th, 1888. The claim endorsed was for an account of what was due for principal and interest, payment, and in default foreclosure or sale, a receiver or manager, and an injunction.

The plaintiff gave notice of motion for the appointment of a receiver of the assets of the defendant company, a manager of its business, and an injunction to restrain them from parting with the assets till trial.

There was evidence on the part of the company that they had ample funds to meet their liabilities, that except the plaintiff's debenture they had no liability except accruing rent and office expenses, which did not exceed £90. The secretary deposed that but for an oversight on his part a check would have been sent for the half year's interest on or shortly after November 28th.

Cozens-Hardy, Q.C., and *E. B. Cooper* for the plaintiff.

Napier Higgins, Q.C., and *Dunham* for the defendants.

NORTH, J., after stating the facts continued :

The interest due not having been paid within fourteen days the creditor says the principal has become due. That is the only question, because the company have offered to pay the interest. The question is not whether there has been an omission to pay interest, but whether default has been made by the company within the meaning of the conditions, which is not necessarily the same thing as the omission to pay.

The proposition made on the part of the plaintiff is that it is the duty of the debtor who has to pay money at a fixed time to find his creditor, provided the latter be in England, and pay him. I do not assent to that statement of the law so broadly put. If it were qualified by the exception I will mention, it would be right. In Sheppard's Touchstone,[1] under the title Condition, I find this passage :

" In cases where a place is set down for the doing of the thing contained in the condition, there it must always be done at that place, unless by some agreement made between the parties afterward another place be appointed, otherwise the condition is not performed, and the parties are not bound to attend in any other place. But in cases where there is no place set down for the doing of the thing contained in the condition, if the thing to be done be a corporal service, as to pay money, or any such like thing, the party that is to do it must, at his peril, seek out the person to whom it is to be done, if he be *infra regnum Angliæ ;* but if he be not within the kingdom, he is not bound to seek him, and yet the condition is not broken. And if the thing to be done be either local—that is, such a thing as must be done in or at a place certain, as the making of a feoffment of land, payment of rent, or the like ; in this case the thing must be done at that very place, and a tender of doing it in that place is a sufficient performance of the condition."

And then he gives illustrations which I need not stop to read. The law is laid down in the same way in a recent text-book, to which I refer, not as an authority, but as a convenient compendium. It is stated in Leake on Contracts :[2]

" If no certain place be appointed in the contract for performance, and it require the presence of the promisee, it must, in general, be made or tendered to him, wherever he may be, subject to the condition in some cases of his appointing a proper place."

Now in the present case, in my opinion, a place is fixed for

[1] Page 136. [2] Page 852.

payment, and it comes under the exception. And there is this to be noticed, that there are two places named, and it is for the person to whom payment is to be made to fix the place at which he will be paid ; until he has selected the place at which he will be paid there can be no default. In my opinion there having been no demand by the creditor at either place, no default has been made by the company.

The case of Robey *v.* Snaefell Mining Company[1] is merely an instance of the general rule where no place is fixed.

PRICE *v.* NIXON.

IN THE COMMON PLEAS, FEBRUARY 5, 1813.

[*Reported in* 5 *Taunton* 338.]

THIS was an action of trover brought against the messenger to the commissioners of bankrupt, to try the validity of a commission of bankrupt which had issued against the plaintiff. The case ultimately turned on the goodness of the petitioning creditors' debt. The plaintiff had applied to them to furnish cordage for a barge, and asked them what was their usual time of credit. They answered that to persons whom they knew they gave twelve months, to others six or nine months. The plaintiff answered that six or nine months would do for him ; nothing more passed, and the goods were furnished. Upon the trial at the sittings after last Michaelmas Term, Mansfield. C.J., thought that there was no bargain for either six or nine months' credit, and that therefore the commission which had issued upon an affidavit of the debt for this cordage, sworn after the expiration of six months, but before the end of the nine months from the delivery, might be well supported, for that there was a debt subsisting as soon as the goods were delivered. The jury, however, found a verdict for the plaintiff.

Vaughan showed cause.

Shepherd in support of his rule.

CHAMBRE, J. The meaning of the plaintiff's language is, "Six months may do for me, nine months will certainly do."

DALLAS, J. The plaintiff takes the right of electing whether the credit shall be six or nine months. By not paying at the end of six months he makes his election not to pay till the end of nine months, and until the nine months are expired there is no debt.

Rule discharged.

[1] 20 Q. B. D. 152.

WILLIAM CHOICE *v.* AGRIPPA MOSELEY.

IN THE COURT OF APPEALS OF SOUTH CAROLINA, DECEMBER, 1828.

[*Reported in* 1 *Bailey* 136.]

TRIED before Richardson, J., at Greenville, Fall Term, 1828.

This was a suit by summary process on a written contract, in these words: "On or before December 25th, 1827, I promise to pay or cause to be paid unto Daniel Hull, or holder, $50, to be discharged in a horse, for value received of him August 14th, 1826." This paper was signed by the defendant, and delivered to Daniel Hull, who subsequently transferred it, by delivery, to the plaintiff.

The day after that specified for payment of the money or delivery of a horse, the defendant went in search of Hull to tender a horse; but Hull having removed, he was unable to make the tender. Subsequently on being apprized that the contract had been transferred to the plaintiff, the defendant went to him and tendered a horse in satisfaction, which the plaintiff refused to accept, on the ground that he had the right to elect, and he preferred the money.

The presiding judge held, that, as to Hull, the right of election was in the defendant, by the terms of the contract; and the plaintiff could claim no higher right than Hull, although he might have taken the note as one for the payment of money: that the tender of a horse to the plaintiff was consequently a performance of the defendant's contract, and discharged the plaintiff's right of action. His honor, therefore, ordered a nonsuit; which the plaintiff now moved to set aside.

Earle for the motion.

W. Thompson, contra.

JOHNSON, J., delivered the opinion of the Court.

The question, whether the note, on which this action was brought, was, or was not, transferable by delivery, so as to enable the plaintiff to maintain an action on it in his own name, does not appear to have been made in the Court below, and cannot therefore be considered here: and I concur with the presiding judge, in the opinion, that the plaintiff stood in no better situation, with respect to his power to accept, or refuse the horse, when tendered, than the original payee would, if the note had not been transferred, but the tender had been made to himself, and the action brought in his name. So that the

only question is, whether the plaintiff was, or was not, bound to accept the horse when tendered.

I take it that the rule is very clear, that when one contracts in the alternative to do one of two things by a given day, he has, until the day is past, the right to elect which of them he will perform ; but if he suffer the day to elapse without performing either, his contract is broken, and his right of election is lost. The present case sufficiently illustrates the reason of the rule. The payee of the note might reasonably calculate upon the value of a horse, at a particular day. He might want him at that time for a particular purpose. But if it were left to the defendant, at his election, to deliver a horse at any indefinite period afterward, he might select that time, at which the value of horses would be most depreciated ; and thus gain an advantage inconsistent with his contract. The note in question was due on December 25th, 1827, and this action was brought in October, 1828. The tender is said to have been made shortly before, so that at least eight months had elapsed before the tender was made. The plaintiff was not bound to accept ; and a new trial must therefore be granted.

Motion granted.

McNITT *v.* CLARK.

IN THE SUPREME COURT OF JUDICATURE OF NEW YORK, FEBRUARY TERM, 1811.

[*Reported in* 7 *Johnson* 465.]

THIS was an action of debt on a bond, dated June 26th, 1807, for $1200. The condition was, if the defendant should pay to the plaintiff $600 in one year from the date, or $400 in six months from the date, then the method of separating, collecting, and preparing the sulphate of ashes into *sal. polychrist.* or *tart. vitriol.* was to belong to the defendant, and the whole right of vending the same in the County of Chenango, and nowhere else, or otherwise the defendant was to return two thirds of the profits arising from the sales of such patent right, at the end of every six months ; and at the end of six months, the defendant was to have his choice, either to pay the $400, or return two thirds of the profits, or to pay the $600 at the end of one year, or return two thirds of the profits at that time ; and the defendant was to prosecute such as should violate the patent right granted to the plaintiff, at his expense.

This suit was commenced in November Term, 1808. The

breach assigned in the declaration was, that the defendant did not pay to the plaintiff the sum of $400 at the end of six months, nor return two thirds of the profits, etc., at the end of every six months, nor has he paid to the plaintiff $600 at the end of one year from the date of the said bond, etc.

The cause was tried at the Oneida Circuit, in June, 1810, before Spencer, J.

The plaintiff having proved the execution of the bond, insisted that the defendant, not having elected to account and return the profits, etc., within the time mentioned in the condition, was precluded from availing himself of such an election and defence, by accounting for the profits; but the judge was of opinion that the defendant might avail himself of a defence upon the third alternative of accounting, without showing any previous election; and that the plaintiff must prove the profits received by the defendant, in order to recover more than nominal damages.

The plaintiff proved that the defendant had sold the patent right he had purchased of the plaintiff, to one Burritt, on September 26th, 1807, and insisted that the defendant had thereby lost the benefit of electing to account for the profits, and was bound to pay one of the specific sums mentioned in the condition of his bond. But the judge charged the jury that the plaintiff was entitled to recover nominal damages only, and a verdict was found accordingly.

A motion was made to set aside the verdict, and for a new trial.

Gold for the plaintiff.

Sedgwick, contra.

PER CURIAM. The defendant showed nothing in his defence, and he is, therefore, to be considered as having failed in every part of the condition of the bond, and to have performed neither alternative. He had his election to pay the $400 at the end of six months, or account, or to pay the $600 at the end of one year, or account for the profits; but having totally failed, he has lost his election, and the plaintiff may now elect for himself. This is a settled principle. The case of 13 Edw. IV., pl. 12, and which is abridged in Bro., Dette, pl. 159, established this rule. That was debt upon an obligation to pay £20 or 20 bales of wool, and the plaintiff demanded the £20. Pigot and Brian, JJ., held, that before the day of payment, the obligor had his election to tender which of them he would, but that after the day of payment, and no tender made, the obligee had his election to demand which he would. But Brian, J., admitted, that if a man be bound to pay £20 at Easter, or £10

at Michaelmas, here, although he paid not at the first day, he can pay at the second day. In Dyer, 18 a, Baldwin and Englefielde, JJ., recognized the same doctrine; and the cases cited from Cro. Eliz. and Cro. Jac. are to the same effect.

The sale which the defendant made of his right, under the contract in September, 1807, precluded him from the ability to account, as agent or factor, for the proceeds, and he is now bound to pay the $600.

The motion, therefore, on the part of the plaintiff, for a new trial, must be granted, with costs to abide the event of the suit.

New trial granted.

STEVENS *v.* WEBB.

AT NISI PRIUS, CORAM PARKE, B., JUNE 11, 1835.

[*Reported in* 7 *Carrington & Payne* 60.]

ASSUMPSIT, on an undertaking to pay money.

Pleas—*non assumpsit*, and that the undertaking was obtained by fraud and misrepresentation.

It appeared that the defendant's brother, Richard Charles Webb, was in custody on a *capias ad satisfaciendum*, at the suit of the plaintiff, for £35, and that the defendant, who was desirous that he should be discharged, gave the following undertaking:

"THOMAS STEVENS

v.

RICHARD CHARLES WEBB.

"In consideration of the discharge of the defendant, I hereby undertake to pay £35 on Wednesday next, or, in default thereof, to surrender him to the sheriff in this action. Dated March 14th, 1835.

"(Signed by the defendant)."

On the part of the plaintiff, Mr. Sibley, a clerk of the plaintiff's attorney, who was present at the signing of the undertaking, was called, and he denied that any misrepresentation had been made to induce the defendant to sign the undertaking; and he also spoke of a conversation between himself and the defendant at a subsequent period, no one else then being present.

Platt for the defendant.

C. Cresswell for the plaintiff.

PARKE, B., in summing up. If a plaintiff consents to the discharge of a defendant, who has been taken in execution, the

defendant can never again be taken in execution on that judgment; and the only way in which it can in effect be done is for the defendant to give a warrant of attorney to confess a new judgment, and to enter up that judgment, and then take the defendant in execution upon it, but not in the original action. That was, however, not done in the present case, as here the defendant has agreed to surrender him to the sheriff in the original action, which implies that the sheriff shall retake him into his custody in that action. Now, if a party agree that a third person shall do an act, and that third person will not do it, the agreement is broken. In the present case the officer refused to retake the original defendant, because a defendant in execution, once discharged out of custody by the consent of the plaintiff, cannot by law be retaken on that judgment. There was therefore one branch of the agreement that the defendant could not perform; and the law is, that, if an agreement is in the alternative, and one branch of the alternative cannot be performed, the party is bound to perform the other, which, in this case, is to pay £35. It may be that the defendant thought he knew the law better than the attorney's clerk, and thought that the sheriff could retake his brother, or he might have thought that the mere offer to surrender him would satisfy the agreement. Still Mr. Sibley was not standing in any relation to the defendant which at all obliged him to explain the law to the defendant; and, to constitute fraud, it is necessary that Mr. Sibley should have made some false representation to the defendant, as that the surrender could be legally made, or that, to fulfil the agreement, it is only necessary to go to the sheriff and offer to surrender, or some other misrepresentation of that sort, of which I think there is no evidence. Indeed, Mr. Salter says, that Mr. Sibley did express a doubt whether the sheriff would receive the party to be surrendered. There is, I think, no evidence of any misrepresentation by Mr. Sibley; and, unless there was a wilful misrepresentation by him, the special plea is not made out.

Verdict for the plaintiff.

JOHN E. DRAKE *v.* FRANCIS L. WHITE AND ANOTHER.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS,
JANUARY 11, 1875.

[*Reported in* 117 *Massachusetts* 10.]

CONTRACT upon the following agreement, signed by the defendants: "Boston, October 22d, 1872. Received of John E. Drake one Morris & Ireland fire proof safe, which we promise to deliver the same to said Drake, or its equivalent in money, on payment of a certain note signed by said Drake, dated October 22d, 1872, payable in four months from date, for the sum of $276.68." Trial in the Superior Court, before Putnam, J., who allowed a bill of exceptions in substance as follows:

The plaintiff purchased leather of the defendants, giving them his note for the price thereof, and, to secure the payment of the note, deposited with them the safe in question, giving them a bill of sale of the safe, upon the back of which was written the agreement upon which this action is brought.

The plaintiff testified that he authorized the defendants to find a customer for the safe, which he desired to sell, and authorized the defendants to sell it for $400, but that any customer for a less price was to be referred to him. The defendants testified that they were authorized to sell it for $300, but that, if any less sum was offered for the safe, they were to inform the plaintiff, who was to decide about accepting the offer. No customer was found for the safe.

The plaintiff paid his note at maturity, and made a demand for the safe, before bringing this action. The safe was destroyed by the fire of November 9th, 1872, and there was no evidence of negligence or want of due care upon the part of the defendants.

The judge instructed the jury, that by the terms of the agreement the defendants were bound to account to the plaintiff for the value of the safe as it was when deposited with them. The jury returned a verdict for the plaintiff; and the defendants alleged exceptions.

O. Stevens for the defendants.

N. B. Bryant for the plaintiff.

AMES, J. This is a case of a deposit of personal property by a debtor in the hands of a creditor as collateral security for the debt. If it presented merely the ordinary incidents of a pledge, it would be manifest that the action could not be main-

tained. The destruction of the property is conceded to have been accidental, without fault or neglect of duty on the part of the defendants.

But the claim of the plaintiff is, that the transaction differs widely from an ordinary pledge, and he contends that, by the terms of a written contract, the defendants have taken upon themselves a special liability of a much more extensive character. If, in the common case of a pledge, the common law contract were reduced to writing, it would contain among other things a stipulation that the pledgee should not be responsible for the loss of the property, unless some want of reasonable and ordinary care on his part were the cause of such loss. In the present case the parties have reduced their contract to writing, and have omitted to attach to the defendants' liability for the property any limitation whatever. On the contrary, their express promise is to do one or the other of two things : either to return the property specifically, or to pay for it in money. There can be no doubt that if a creditor sees fit to accept a deposit of security upon such terms, and to place himself in the position of an insurer of its safety, he can legally do so. It is not difficult to suppose a case in which the parties might find it convenient that the business of guarding against the risk of fire or other accident should be attended to by the depositary. But however that may be, the proper interpretation of the contract is to be determined by the general rules of construction recognized by the law ; and if the parties have improvidently made their contract more onerous than they expected, the difficulty cannot be removed by a violation of those rules.

It is said that the written instrument declared upon is a receipt and as such is open to explanation. It is true that it is a receipt, but it is also a promise clearly expressed. Brown *v.* Cambridge, 3 Allen, 474. We see no way to avoid the conclusion that the plaintiff's construction of that promise is correct. The difficulty with the defendants' case is, that, although their purpose was to take collateral security for a debt, the terms in which they have expressed themselves as to what they are to do with the pledge on the payment of the debt contain a positive and unequivocal promise either to return it, or to pay an equivalent. The fact that one part of this alternative promise has become impossible of fulfilment does not relieve them from the other. Chit. on Con., 11th Am. ed., 1061 ; Stevens *v.* Webb, 7 C. & P. 60 ; State *v.* Worthington, 7 Ohio, 171.

Exceptions overruled.

CHAPTER VI.

CONDITIONAL AND UNCONDITIONAL CONTRACTS

Section I.—Conditions Precedent or Concurrent.

(*a*) *Express or implied in fact.*

RANAY *v.* ALEXANDER.

In the King's Bench, Michaelmas Term, 1605.

[*Reported in Yelverton* 76.]

The plaintiff declared that whereas the defendant was possessed of 17 tod of wool, and whereas *colloquium fuit* between them for 15 tod of the 17 tod, to be chosen by the plaintiff; the defendant in consideration of £6 to be paid on such a day, etc., promised to deliver the plaintiff *prædictas* 15 tod of wool, and said *in facto*, that he was ready at the day to pay the £6, yet the defendant had not delivered the plaintiff the 15 tod of wool, to his damage, etc. And upon *non assumpsit* pleaded, it was found for the plaintiff; and it was shown in arrest of judgment that the declaration was not good, because the plaintiff had not shown that he had chosen 15 tod out of the 17, and that is *quasi* a condition precedent; and an act to be first performed by the plaintiff, before the defendant is bound by his promise to do anything. *Quod fuit concessum per totam curiam.* But per Popham, C.J., if the defendant had sold one of the tods of wool before election made by the plaintiff, that had destroyed the election, and made the promise absolute, and had been a breach of it. The same law if the defendant would not have permitted the plaintiff to see the wool, that he might make election; for that had excused the act to be done by the plaintiff, and had been a default in the defendant. And the matter aforesaid is much enforced by the word *prædictas* in the declaration, for that can be referred to nothing but the communication by which the plaintiff of his own showing ought to make election. Then the plaintiff omitting it in his declaration shows the fault is in himself, which ought to be removed before he can charge the defendant. But if the communication had been, that the plaintiff

should choose 15 tod of the 17, and the plaintiff had declared the promise to be to deliver 15 tod generally, without saying *prædictas*, there, if the promise had been found, the plaintiff should have judgment, for the *colloquium* might have been conditional and the promise absolute. *Quod nota.* But the judgment was *nil capiat per billam.*

HUNLOCKE *v.* BLACKLOWE.

In the King's Bench, Easter Term, 1670.

[*Reported in* 2 *Saunders* 155.]

Debt on bond dated the last day of July, in the sixteenth year of the reign of the now king, conditioned to perform covenants in articles of agreement. The defendant, after oyer of the condition, sets out the articles by which it appears that the plaintiff, being a tailor, had assigned his trade to the defendant, and all the benefit of the customers named in a schedule annexed to the articles; and the plaintiff covenants with the defendant, that he would from thenceforth leave off and desist from using and exercising the trade of a tailor with any of the customers named in the schedule, with several other covenants on the part of the said plaintiff to be performed, and the said defendant, in consideration of the performance thereof, covenants that he will pay the plaintiff £100 a year during his life by quarterly payments, with divers other covenants on the part of the said defendant to be performed; and the defendant, after he had shown all the covenants, pleads in bar that the plaintiff, after the making of the said articles, to wit, on August 1st, in the aforesaid sixteenth year, at, etc., used and exercised the art and mystery of a tailor for and with the said Mr. Pierrepoint (namely, one of the customers named in the schedule) for the sole benefit of the said plaintiff, etc., to which plea the defendant demurred in law.

And it was urged by Saunders for the defendant, that the words, "in consideration of the performance thereof," make a condition precedent, so that when the plaintiff had broken his covenant by using his trade with one of the customers, the defendant was not bound any longer to pay the £100 a year to the plaintiff. And here the plaintiff had used his trade with one of his customers before any payment of the £100 a year became due, and therefore the defendant was discharged from the payment of the £100 a year. And to prove that this was a condition precedent, he cited 3 Leon. 219, Brocas's Case, where

the lord of a manor covenanted to assure the freehold to one of his copyholders and his heirs, and the copyholder in consideration of the same covenant performed, promised to pay a certain sum of money, and it was adjudged that the copyholder was not obliged to pay the money until the lord had first performed the covenant on his part ; but it is otherwise, says the book, if the covenant on the part of the copyholder had been, in consideration of the covenant to be performed. And here the words are in consideration of the performance of the plaintiff's covenant, which is as much as to say in consideration of the covenant performed. Wherefore he concluded that here was a condition precedent, which being broken, the defendant is not bound to pay the £100 a year.

Sed non allocatur ; for the plaintiff's covenant being in the nature of a negative covenant—namely, that he will not use his trade with the customers—if the words, in consideration of the performance thereof, should amount to a condition precedent, the plaintiff would never have the £100 a year during his life, because it is not possible for the plaintiff to perform his covenant in his lifetime, for at any time during his life he may break it, and a negative covenant is not said to be performed until it becomes impossible to break it, which impossibility can only happen here by the plaintiff's death. And therefore such a construction would entirely defeat the intention of the parties, for it plainly appears that their intent was that the plaintiff should have the £100 a year during his life, and therefore it is not a condition, but the defendant may have his action of covenant against the plaintiff for breach of the covenant on his part. And although it was urged that the £100 a year should be paid until the plaintiff has broken the covenant on his part and no longer, and that such was the true meaning of the parties, and when the plaintiff has voluntarily broken the covenant on his part, he seems to be content that the £100 a year should not be paid any longer, yet this was overruled by the Court. Wherefore it was adjudged for the plaintiff.

THORP *v.* THORP.

IN THE KING'S BENCH, EASTER TERM, 1701.

[*Reported in* 12 *Modern Reports* 455.]

ERROR from the Court of Common Pleas of a judgment in an action on the case, wherein the plaintiff declared that the defendant had and held of him, by way of mortgage, two closes of copyhold lands ; and that there was a discourse between

them concerning the plaintiff's releasing his equity of redemption therein to the defendant, and concerning divers sums of money due from the plaintiff to the defendant upon the said mortgage ; upon which the plaintiff did agree with the defendant that he would release to him the said equity of redemption, in consideration of which the defendant did agree with the plaintiff to pay him £7 above all that was due, and that in consideration that the plaintiff promised the defendant to perform all of his side, the defendant promised the plaintiff to perform of his side ; and avers that he did perform all on his, the plaintiff's side, but that the defendant paid £1 7*s.* of the said £7 and no more, etc.

To this the defendant pleads in bar that long after the promise—viz., July 29th, 1694, the plaintiff did, by indenture made between him and the defendant, release to the defendant "all manner of actions, suits, debts, duties, sum and sums of money, and all demands whatsoever, which ever he had, or he, his heirs, executors, or assigns ever should have, for or by reason of any thing, matter or demand whatsoever."

Upon oyer of this deed of release it recited the said mortgage, and released "all provisoes therein, and all his estate, right, title, and interest in the said close, both in law and equity ;" and then follows the foregoing clause.

And upon this the plaintiff demurred, and judgment for the plaintiff in the Court of Common Pleas.

Cowper for the plaintiff in error.

Cheshire, *contra*.

Holt, C.J. We all agree that the promise was not discharged by this release. It was urged at the Bar by Cowper that if the plaintiff might have founded an action upon the mutual promise and agreement before any performance on his part, that certainly this release would have barred him ; and the consequence is very true and necessary, if that were the case. And by the same reason, if he could not bring an action before such time as he had made a release, there is no color for the release to bar him, for till he makes the release in this case, if he has no title to the £7, then till release there is no right of action ; and then they do not lie in demand till release, and that a release of "all demands" will not release a thing that does not lie in demand at that time. See 2 Cro. 171 ; 5 Co. 70 ; Hoe's Case. A release to bail in the King's Bench before judgment against the principal is not good, because till then the cause of action is uncertain and therefore not demandable.

So the whole question will be here whether the plaintiff could have an action before the release. And as to that it has been

urged that in this case there were mutual promises, and the one promise is the consideration of the other ; and that then he that brings the action needs not aver any performance of his side ; and this likewise would be a true and necessary consequence if the premises were true. But where the one promise is the consideration of the other, and where the performance, and not the promise is it, is to be gathered from the words and nature of the agreement, and depends entirely thereupon, for if in this case there were a positive promise that one should release his equity of redemption, and on the other side that the other would pay £7, then the one might bring his action without any averment of performance ; but this agreement is not so, but that the plaintiff should release his equity of redemption, in consideration whereof the defendant was to pay him £7, so that the release is the consideration, and therefore being executory is a condition precedent which must be averred. And whereas there seems to be a variance in the books upon this learning, it will be fit on this occasion to settle it ; and I agree the case in Hob. 58 to be good law, for there is a positive agreement that one shall deliver a cow to the other, and that the other shall give him so much money, and therefore the action lies for either side without performance of his promise ; but if by the agreement A. were to deliver B. a cow, and that for it B. were to deliver him a horse, there the delivery of the cow would be a condition precedent, and therefore ought to be performed before A. can bring his action, and upon this diversity the books are reconcilable. 15 Hen. 7, 10, pl. 17. If A. covenant with B. to serve him for a year, and B. covenant with A. to pay him £10, there A. shall maintain an action for the £10 before any service ; but if B. had covenanted to pay £10 for the said service, there A. could not maintain an action for the money before the service performed. And there is great reason for this diversity, for when one promises, agrees, or covenants to do one thing for another, there is no reason he should be obliged to do it till that thing for which he promised to do it be done, and the word "for" is a condition precedent in such cases. But upon this head some diversities are to be observed.

First, if there be a day set for the payment of money, or doing the thing which one promises, agrees, or covenants to do for another thing, and that day happens to incur before the time the thing for which the promise, agreement, or covenant is made, is to be performed by the tenor of the agreement ; there, though the words be "that the party shall pay the money," or "do the thing for such a thing," or "in consideration of such a thing," after the day is past the other shall have

an action for the money or other thing, although the thing for which the promise, agreement, or covenant was made be not performed; for it would be repugnant there to make it a condition precedent, and therefore they are in that case left to mutual remedies on which, by the express words of the agreement, they have depended. See 48 Edw. 3, 2-3, cited in Ughtred's Case,[1] where the diversity is taken when there are mutual remedies and not; it is thus put in that book: Sir Richard Pool covenants with Sir Ralph Tolcelser to serve him with three esquires in the wars of France; Sir Ralph Tolcelser covenants, in consideration of those services, to pay him so much money; and there it is said action will lie for the money without any services performed. But if you look into the book at large, you will find it was upon the diversity which I have taken, for the case in 48 Edw. 3, 2-3, is, Richard Pool covenants with Ralph Tolcelser to serve him with three esquires in the wars of France, and Ralph Tolcelser covenanted with him to pay him so much money for the service; and it was further agreed that twenty marks of the money should be paid in England, at a day certain, before they went for France, and the rest by quarterly payments, which might likewise incur before the service; and upon action brought by Sir Richard Pool it was objected that the service was not performed, but there was no room for that objection upon the diversity which I have taken, the money, by the agreement, being made payable at a day certain before the service was to have been performed. 1 Vent. 147. Covenant that in case A. would let B. enjoy land for a certain term of years, for the enjoyment he would pay him so much money before the expiration of the years. 3 Leo. 156. Covenant to pay so much money, the other making him a good estate in such lands; held the making the estate to be a condition precedent, and therefore to be averred. 1 Saund. 319 is upon the same diversity. An agreement was to let a house to the plaintiff with certain brewing vessels; the plaintiff covenants to pay so much money for it before midsummer day, and here, because a day certain was appointed for the payment, though no assurance was made of the house, etc., yet an action lay for the money. If A. covenant to make an assurance of lands to B. who covenants to pay him £10 in consideration thereof, there he is not bound to pay the money before the assurance made; but if he had covenanted to pay the money in consideration of the covenant to make the assurance, he would be liable to an action immediately.

Secondly, if there be a day for the payment of the money or

[1] 7 Co. 10*b*.

doing of other act for another, and that day is to be after the performance of the thing for which the promise, etc., was made, there, if the agreement be to pay the money, or do other thing "for" or "in consideration," or such other words that would make a condition precedent, there such things, for the doing or performing of which the other agrees to pay the money, or do other thing, must be averred to maintain an action, and for this Sir W. Jones, 318. The executor of A. brought an action on the case against B. declaring that in consideration A. in his lifetime did promise to assure certain lands to B. before Michaelmas next. B. promised to pay him so much money for the land, so the assurance was to be made before Michaelmas, and the money was to be paid for the land, and consequently after Michaelmas, for A. had time till Michaelmas to make the assurance; and because the assurance was to have been made first, and the money by agreement to be paid for the land, though there were mutual promises, yet it was adjudged the action would not lie for the money without making the assurance first. This case, as it is there reported, is intricate, and requires consideration to make this construction upon it; but upon examination it is a full authority in point. Dy. 76, pl. 3. A. agrees to deliver B. a hawk at midsummer, for which he agrees to pay him a horse at Michaelmas; there if a hawk be not delivered at midsummer, there shall be no horse delivered at Michaelmas, nor any remedy for it. Ughtred's Case has afforded a ground for a variety of opinions upon this question, but such as seem against these diversities laid down by me shall receive a full answer. And in 1 Roll. Ab. 414 are several cases which have been urged against me. The first is said to have been in Michaelmas Term, in the seventh year of James the First, and it was a charter partite between A. and B. by which A. covenants to go a voyage, and take in several ladings at several ports beyond the seas, and return with them home; B. covenants to pay A. for all that voyage £147 at a day, whether after or before the voyage is left in doubt by the Book; and there it was adjudged there might have an action lain for the money without averment of performance of the voyage, and this seems an authority in point against me. But, first, it does not appear there but that the day of payment was before the voyage performed; but a full answer to it is that there was a writ of error brought, and that judgment reversed for want of an averment. See 3 Bulst. 147. Rolle reports the judgment in the Common Pleas, in the seventh year of James the First, but it seems had not seen the reversal thereof, which was in the ninth year of James the First, two years after, as it is in Bulstrode, where it is adjudged that

pro totâ transfretatione is a condition precedent, and that its being in mutual covenants makes no alteration. Then there is 1 Roll. Abr. 415, said to be in Michaelmas Term, in the fifteenth year of Charles the First, and it seems also against me in point. There were articles of agreement made by A. in behalf of B. of the one part, and C. of the other part, where it was covenanted by A. that B. for consideration hereafter expressed, should convey certain lands to C.; C. on his part, for the consideration aforesaid, covenanted to pay B. £156; and it was adjudged that the assuring the land was not a condition precedent. But this case does not come up to ours, for there is an express covenant that (for consideration hereafter expressed) B. would convey to C. and C. (upon consideration aforesaid) covenants to pay the money, and that must be for as much as A. hath covenanted that B. should assure lands for consideration hereafter mentioned—that is, that B. hath covenanted to pay so much money, for it is *pro consideratione prædictâ;* and the question is, What is meant by the words *pro consideratione prædictâ?* It is not said, "for consideration of conveyance of the land," but *pro consideratione prædictâ*, which must be understood in consideration of the agreement that B. should convey, etc., for the one covenants for consideration hereafter mentioned, which must be the covenant for payment of the money, and the other covenants for consideration aforesaid, which must be that A. covenanted that B. should convey. But I must needs say there is another home case; it was also in the time of King Charles the First, and it was on mutual promises to stand to an award between A. and B. and laid in consideration A. on his part did promise to stand to the award, B. on his part did promise to stand to it; and the award was made that A. should pay B. £10 in consideration whereof B. should enter into an obligation to release unto A. all actions; A. brings an action against B. for not entering into the obligation according to the award; and he did aver that he had done all on his part, but that B. had not entered into the obligation, and the exception was taken that there was no averment of the payment of the £10, in consideration whereof he was to have entered into the bond, but it was said there needed no averment, and this is full against me. But Rolle himself there says the Court were divided. And 1 Cro. 384 gives a quite contrary report of the case, and says Jones and Berkely held it a condition precedent against Croke; so I rather believe Croke, who was one of the judges, and tells you himself was of a contrary opinion. And as to Haye's Case, which is also in 1 Roll. Abr. *ubi supra*, it is reported 1 Cro. 433, and it has no such point in it. These authorities therefore are well

answered. There are some other scattered authorities in the books of this kind. But let us now see the reason of the thing. What is the reason that mutual promises shall bear an action without performance? One's bargain is to be performed according as he makes it. If he make a bargain, and rely on the other's covenant or promise to have what he would have done to him, it is his own fault. If the agreement be that A. shall have the horse of B., and A. agree that B. shall have his money, they may make it so, and then there needs no averment of performance to maintain an action on either side; but if it appear by the agreement that the plain intent of either party was to have the thing to be done to him performed, before his doing what he undertakes of his side, it must be then averred, as where a man agrees to give so much money for a horse, it is plain he meant to have the horse first, and therefore he says the money shall be given for the horse. And it would be very dangerous to make every cursory agreement of parties to amount to mutual promises to bear an action without averment of performance; and therefore if two meet, and the one has a horse to sell, and the other would buy one, and they agree on the price, and then part without any earnest, or reducing the matter solemnly into writing, there, though there be no words of condition precedent, such cursory agreement ought not to be admitted as evidence of a mutual agreement; and it ought not to pass for a contract, but rather for a bare communication. See Dy. 30, —, 24; Style, 32. But if there be a solemn transaction, as writing, as that A. would deliver his horse to B. and no time appointed, and that B. should pay so much money to A. there, if there be not the word "for" or other words of condition precedent, a mutual action will lie without averment of performance; but if it be only a discourse, without the solemnity of writing, earnest, etc., it ought not to be allowed. There is a case in 2 Mod. 33. In *assumpsit* the plaintiff declared that in consideration that he promised to assign to the defendant his interest in certain land, the defendant promised to pay him *proinde* so much money, and averred that he offered to assign the interest; but that matter being not well pleaded, the question was, whether it was necessary to aver performance, and held on the reason of Ughtred's case that it was not. And this will be a light to the reasons of North *v.* Wild there. See Style, 186. Covenants were between A. and B. that A. should bring 500 soldiers to such a place by a day certain to be transported, and that B. should attend there then with ships to transport them, and both parties failed; and the question was whether, though A. had brought no soldiers, B. had broke his covenant,

in not being ready with ships ; and held that B. had broke his covenant, though A. had not brought the soldiers. But this differs from our case, for there are two distinct acts to be done, one is to be ready with the soldiers and the other with ships, and the performance of the one does not depend upon the other ; the doing of the one is not the reward for the doing of the other, but they are distinct acts, and each party to do his part ; there was also a day appointed. And this is not a hard case, for they are mutual acts not depending the one on the other. But in our case the money was to be paid for the release, and a vast difference. And the £7 being not to be paid in consideration of making the release, the words "in consideration" make a condition precedent, which till performed does not entitle the plaintiff to action. Then the £7 were not demandable here, and consequently not dischargeable by the general release of all demands.

Another objection was that the plaintiff had not averred a release given or tendered by him, as he ought to have done. But here sufficient appears that it was done, for he avers performance of all that was to be done on his side ; and that general averment, though informal, and beside wants time and place, for which it had been bad on demurrer, is helped by the defendant's passing it over and pleading a release, whereby he admits the plaintiff had a cause of action. And there are stronger cases than this in the books, where pleading over has helped an insufficient declaration. 3 H. 6, 8. Debt upon indentures, in which there was a penalty, in which the defendant did bind himself, if he did not perform all the covenants in the said indentures ; and regularly in such cases the way is for the plaintiff to set forth the indentures, and to assign breach of one of the covenants in certain ; and in debt for the penalty he said generally, that the defendant had broke all the covenants in that indenture without showing any one in certain ; the defendant pleaded a collateral matter in bar, and adjudged the declaration had been bad on demurrer, but that the plea over cured it, though the breach was double and uncertain. 9 H. 6, 16, 19. And it was so adjudged in this Court in Bernard v. Michel.[1] But a full authority is that of Vivian v. Shipping,[2] though they agreed the money awarded was to be paid before the other was to enter into the obligation to the plaintiff ; yet the plaintiff did not expressly aver payment, but generally, as here, that he had performed all on his side, and that was adjudged good after plea pleaded. So we all agree the judgment ought to be affirmed, for there was no money due to

[1] 1 Vent. 114, 126 ; S. C. 2 Keb. 754, 766. [2] Cro. Car. 384.

the plaintiff till release of the equity of redemption, and therefore none demandable till then, and consequently a release of all demands could not bar it.[1]

NOTE.—In this case Cowper offered this diversity in relation to mutual promises, that where the promise is of a valuable thing to the defendant, there such promise, without any performance, may be a good consideration ; but where the promise is not of a thing valuable, but may be a consideration, because a trouble to the party promising ; there such promise, without a performance, cannot be a consideration, because such promise cannot be a trouble.

But per HOLT, C.J., no diversity at all, but the cases are the same upon the learning laid down above.

CALLONELL *v.* BRIGGS.

IN THE KING'S BENCH, TRINITY TERM, 1703.

[*Reported in* 1 *Salkeld* 112.]

AN agreement was, that the defendant should pay so much money six months after the bargain, the plaintiff transferring stock. The plaintiff at the same time gave a note to the defendant to transfer the stock, the defendant paying, etc., Holt, C.J. If either party would sue upon this agreement the plaintiff, for not paying, or the defendant for not transferring, the one must aver and prove a transfer or a tender, and the other a payment or a tender ; for transferring in the first bargain was a condition precedent ; and though there be mutual promises, yet if one thing be the consideration of the other, there a performance is necessary to be averred, unless a certain day be appointed for performance. 1 Saund. 319. If I sell you my horse for £10 if you will have the horse, I must have the money, or, if I will have the money, you must have the horse ; therefore he obliged the plaintiff either to prove a transfer, or a tender and refusal within the six months.

[1] The judgment therefore was affirmed. S. C. 1 Ld. Ray. 667.

LOCK *v.* WRIGHT.

In the King's Bench, Hilary Term, 1723.

[*Reported in* 1 *Strange* 569.]

The plaintiff declares, that the defendant by his writing indented agreed with the plaintiff, that he, the defendant, would accept of the plaintiff £500 fourth subscription so soon as the receipts should be delivered out by the company, and would pay for the same £950 on November 5th next after the date of the writing. Then he avers, that the defendant did not pay the money at the day.

The defendant demurs generally, and Mr. Lingard *pro defendente* objected that the plaintiff had not shown the delivery of any receipts, or an impossibility of doing it, and cited 1 Lutw. 245 ; Salk. 171.

Probyn, *contra*, answered, That there were mutual remedies, and, therefore, it need not be shown. 1 Saund. 319 ; Lev. 274.

Eyre, J., doubted whether here was a mutual remedy, for the plaintiff does not covenant to deliver, but the other only to accept ; to which Fortescue, J., inclined. *Sed per* Pratt, C.J. The time for payment of the money is certain at all events ; but as for the delivery of the receipts, that was left uncertain, because it was impossible to fix a time for that ; and if the defendant has made a foolish bargain in undertaking to pay the money on November 6th, whether he had the receipts or not, we cannot help him. The nature of these contracts is for the other party to give a deed obliging himself to deliver the stock ; but even upon this agreement I should think the defendant would have his remedy. In the case of a deed poll, if the lessee enters and enjoys the land, the other shall maintain debt for rent, and yet the whole is the words of the lessor.

Pasch. 8 Geo. It was argued a second time by West *pro defendente*. It will not be disputed but that generally speaking the word *pro* will create a condition precedent. 1 Vent. 147 ; 2 Mod. 33 ; 1 Lev. 17 ; Salk. 112. And that it will do so in this case, if I can clear it from two objections that have been made. 1. That here is a mutual remedy ; and, 2. That here is a particular day fixed for the payment of money.

As to the first, that is begging the question, for I take it there is not a mutual remedy, the words being the words of the defendant only, "That he will accept the subscription, and pay for the same," which lays the plaintiff under no obligation to deliver the receipts. 1 Saund. 320.

2. As to the second objection, that there is a particular day appointed for payment of the money, I do admit, that if it appeared upon the contract, that such a day must of necessity happen before the receipts could be delivered, it would then be very difficult to answer it; but that is not this case, for the company might if they pleased have given out the receipts, and that brings the case within the distinction laid down by Holt, L.C.J., in the case of Thorp *v.* Thorp, Salk. 171. Besides, it is observable, that this is an entire covenant, to accept and pay, so that he is not to pay till he can accept. Lutw. 491.

Recve, *contra*. I admit the first part of Mr. West's argument, but insist on the two objections he has taken notice of, as sufficient to bring this case out of the reach of that general doctrine.

Here is a certain sum to be paid at a certain day, and that too before the other part of the contract could possibly be performed. The Court will take notice of the South Sea acts, and by that of 7 Geo. St. 2, it appears the receipts could not be delivered by November 6th; so that this case falls within the first distinction of Thorp *v.* Thorp, that if a day be appointed for payment of the money, and that day is to happen before the thing can be performed, an action may be brought for the money, before the thing be done: because it appears the party relied upon his remedy.

But then, say they, here is no mutual remedy. But I take it, that this being an agreement by indenture, the Court will intend it was executed by both parties. As to the cases they are all of parol agreements, where a consideration must appear to make it a binding promise; but here the action will be maintainable on the bare covenant to pay, without any consideration at all, and therefore the *pro*, etc., may be left out.

Adjournatur. And this term Pratt, C.J., delivered the resolution of the Court.

This is an action upon a deed poll made by the defendant, and whereby he covenants to accept so much stock, and to pay for the same, and the plaintiff in an action for the money has not averred a delivery or tender of the stock, and for this fault we are all of opinion the declaration is not good.

The intent of the parties appears to be, that one should have the money, and the other the stock; and not that either should perform his part of the agreement, and lay himself at the mercy of the other for the equivalent. This is not a covenant entered into by both parties, upon which each will have his mutual remedy; but it is the deed poll of the defendant only, and, therefore, though upon delivery or tender of the stock the plaintiff will have his remedy for the money, yet the defendant

on the other side upon payment of the money will have no remedy to compel the delivery of the stock ; and having no such remedy he shall not be obliged to pay the money, till the consideration for which it is payable is performed.

The word *pro* will be either a condition precedent or subsequent, as will best answer the intent of the parties ; in this case it must be a condition precedent, because otherwise the intention of the defendant to have the stock for his money can never take effect, and this is proved by 7 Co. 10, and 1 Inst. 204, where the annuity *pro una acra*, says the book, supposes the acre to be first granted.

The case of Callonel *v.* Briggs, Salk. 112, was not so strong, for there was a promise to transfer, which gave a mutual remedy ; but yet Holt, C.J., held the plaintiff to show a tender, because that was the consideration for the defendant's payment of the money. And the case he there puts of the sale of a horse for £10 is exactly the same with this.

The resolutions that were mentioned at the bar of the case of Thorp *v.* Thorp are all founded on great reason, and the first of them is agreeable to the resolution of this case, which is an executory contract, where one is to do the act, and for the doing thereof the other is to pay.

And this difference between a mutual covenant and a deed poll is likewise taken and allowed in the case of Pordage *v.* Cole, 1 Saund. 320, where the Court were of opinion the defendant had his remedy, "otherwise (says the book) it would have been, if the deed had been the words of the defendant only," which is this case.

For these reasons we are all of opinion the defendant must have judgment.

JOHN THOMAS *v.* MARGARET CADWALLADER, ADMINISTRATRIX OF CHARLES CADWALLADER.

IN THE COMMON PLEAS, NOVEMBER 24, 1744.

[*Reported in Willes* 496.]

COVENANT : The plaintiff declares upon an indenture dated February 10th, 1720, whereby the plaintiff and one Rebecca Thomas, since deceased, demised to Charles Caldwallader a messuage and tenement in Bishop's Castle, with the stable, mill, garden, and backside or yard thereto belonging (except as therein excepted), to hold the same from March 25th then next for twenty-one years under the rent of £10 a year, payable

at Michaelmas and Lady-day. And the said Charles did thereby covenant for himself, his executors, administrators and assigns to and with the said John Thomas, his heirs and assigns, that he, the said Charles, his executors, administrators, and assigns, should and would from time to time, and at all times during the said term, uphold, maintain, repair, and keep the said messuage and other the demised buildings thereto belonging in good and sufficient repair, and the same at the end or sooner determination of the said term should and would surrender and yield up to the said John and Rebecca, their heirs and assigns, in good and tenantable order and repair, he, the said John, his heirs and assigns, finding, allowing, and assigning timber sufficient for such reparations during the said term, to be cut and carried by the said Charles, his executors, administrators, and assigns.

And the plaintiff sets forth that Charles entered by virtue of the said indenture, and being possessed of the said demised premises died at Ludlow on April 22d, 1735 ; and that administration of all his goods, etc., with his will annexed, was afterward duly granted to the defendant, who by virtue thereof entered upon the demised premises, and was possessed thereof until the end of the said term ; and that at the end of the said term of twenty-one years and for the space of five years then before the said messuage and other, the demised buildings thereto belonging were greatly ruinous and in decay and wanted necessary reparations and amendments ; and that the defendant during her possession of the said messuage, etc., did not uphold, maintain, repair, and keep the same in good and sufficient repair, and the same at the end of the said term surrender and yield up in good and sufficient order and reparation, but at the end of the said term left the same so in decay and wanting great reparations as aforesaid, contrary to the form and effect of the said covenant, etc., and lays his damage at £100.

The defendant pleads that the plaintiff during the said term did not find, allow, or assign timber sufficient for upholding, repairing, maintaining, or keeping the said messuage and other the said demised premises in good and sufficient repair ; to which the plaintiff demurs generally, and the defendant joins in demurrer.

And upon this it came in judgment before the Court.

Bootle for the plaintiff insisted on three things :

First. That the plea was too general, it only saying that the plaintiff during the term did not find, etc.

Secondly. That the finding of timber by the plaintiff was not a condition precedent, but a mutual or reciprocal covenant, and

consequently that the breach of it cannot be pleaded to an action brought on the covenant of the lessee.

Thirdly. That if it could be insisted on by way of plea, yet that a request ought to have been pleaded.

And he cited the case of Warren *v.* Asters, Sir Tho. Jon. 206, where the lessor covenanted that the lessee should have liberty to cut trees for repairing, he making good the fences and ditches, and it was holden not to be a condition, but a mutual covenant. That the word "paying" has been held to be a covenant and not a condition. And he cited a case in B. R. reported in Lucas, 153, 189, and 222, where it was held that, if a man covenanted to pay money due on a judgment to a person, he assigning the judgment, on an action of covenant brought for nonpayment of the money, the defendant could not insist that the plaintiff had not assigned the judgment, it being a mutual covenant and not a condition precedent. He cited likewise 3 Lev. 41 ; the case of Pordage *v.* Cole, 1 Saund. 319 ; and 1 Rol. Abr. 518, the case of Holder *v.* Taylor, to show that these words in the present case are not to be considered as a condition, but as a mutual covenant. But in the case cited out of Rolle the words are plainly words of covenant, and it is there said that if the words had been that the lessee should repair, provided the lessee find him great timber for it, they would not have been considered as a covenant on the part of the lessor, but as a qualification of the covenant of the lessee, so that this case is rather an authority against the plaintiff.

He insisted likewise that if this were necessary to be done by the plaintiff, yet that the first act was to be done by the lessee, for that he was to request the plaintiff to find timber ; and that he ought likewise to show that these were such repairs for which timber was necessary, for which purpose he cited 1 Rol. Abr. 465, pl. 28.

Hayward for the defendant did not much insist that the plea was good, but said that the declaration was bad, and that then it was immaterial whether the plea were good or not. He said that these could not be considered as mutual covenants, for that the finding of timber was a condition precedent, or the qualification of the lessee's covenant. That *ipso faciente* and *si ipse fuerit* have exactly the same meaning ; and that if the words had been *si ipse invenerit*, it had undoubtedly been a condition precedent. That the breach, therefore, is not assigned upon the covenant in the deed, for the covenant to repair is a qualified covenant, and *sub modo*, and the breach is assigned of an absolute covenant to repair. He cited the case of Large *v.* Cheshire, 1 Ventr. 147 ; 1 Rol. Abr. 414 ; and 2 Danvers, 229,

title "Covenant" (C), S. 2 and 3, where it is holden that though the word "agreed" makes a covenant, yet that "provided always" makes no covenant, but is a condition precedent. And he put the case that a man should covenant with A. to go to York, A. finding him a horse for that purpose; where it was plain that the covenantor was not obliged to go to York unless A. provided him a horse; which case, he said, was exactly parallel with the present. He therefore insisted that the plaintiff ought to have set forth in his declaration that he was always ready to find and assign him timber, and that not having done so the declaration was insufficient.

We were all of that opinion, and gave no opinion upon the plea.

I thought that none of the cases, though in my opinion they had gone too far already, came up to the present case; for that this finding of timber was a thing in its nature necessary to be done first, and, therefore, must be considered as a qualification of the lessee's covenant. When two covenants in a deed have no relation to each other, I was clearly of opinion that the non-performance of one could not be pleaded in bar to an action brought for the breach of another covenant in the same deed, and for this plain reason among others that the damages sustained by the breach of one such covenant may not be at all adequate to the damages sustained by the breach of the other; and, therefore, I held that all the cases were right where nothing more was determined. The case of assigning the judgment is plainly different; for a man may pay the money before the judgment is assigned. The case of paying rent is also different, because a man may enjoy the land, nay ought to enjoy it, before he pays rent. The case of repairing the hedges and fences likewise stands on the same reason, for there the wood must be cut down before the hedges and ditches are mended. But a man cannot repair until the timber is assigned him for such repairs. And the case in 1 Rol. Abr. 518, and that in 2 Danvers, 229, are strong authorities for the defendant; for the word "provided," which was there holden to make a condition, is not so strong an expression as the words "finding and allowing," in the present case. But I expressed my dislike of those cases, though they are too many to be now overruled, where it is determined that the breach of one covenant, though plainly relative to the other, cannot be pleaded in bar to an action brought for the breach of the other, but the other party must be left to bring his action for the breach of the other; as where there are two covenants in a deed, the one for repairing and the other for finding timber for

the reparations, this notion plainly tending to make two actions instead of one, and to a circuity of action and multiplying actions, both which the law so much abhors. If, therefore, this were a new point, I should be inclined to be of opinion that, though where there are mutual covenants relative to one another in the same deed a plaintiff is not obliged in an action brought for the breach of them to aver the performance of the covenant which is to be performed on his part, yet that the defendant in such action may in his plea insist on the non performance of the covenant to be performed on the part of the plaintiff, but this has been so often determined otherwise, that it is too late now to alter the law in this respect. But where words make a condition precedent or a qualification of a covenant, as the present case plainly is, all the cases agree that the plaintiff in his declaration must aver the performance of such condition or qualification.

And my brothers, Abney and Burnett, being both of the same opinion with me.

Judgment was given for the defendant.

OLIVER KANE ET AL. *v.* JOHN HOOD.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, OCTOBER TERM, 1832.

[*Reported in* 13 *Pickering* 281.]

ASSUMPSIT, brought by the executors of John Innis Clark. Trial before Shaw, C.J.

The plaintiffs rely upon an unsealed contract made by Clark and Hood, dated October 28th, 1803, by which "it is mutually agreed, that Hood is to have the land, etc. (describing certain land in Somerset); in consideration of which the said Hood is to pay the said Clark $700, $200 of which are to be paid in ten days, half the remainder in twelve months, and the other half in two years from the above date, with the interest annually; and the deed to be executed at the completing of the last payment."

The first two instalments had been paid and received before the commencement of this action.

The plaintiffs neither allege nor prove that they ever made or tendered, or offered any deed or conveyance of the land, but they aver that Clark, in his lifetime, and they, in their capacity of executors, since his decease, have always been ready to con-

vey the land to Hood, and to execute to him a good and sufficient deed thereof, upon his complying with the terms of the contract on his part, and that they are here in Court ready to execute such deed upon his complying with those terms.

The defendant contends, that the two first instalments being fully paid, the agreements of the parties in respect to the last instalment are mutually dependent and conditional, and neither is bound to perform, without a tender of performance on the other side, to be made at the same time.

On the contrary, the plaintiffs contend, that the promise of the defendant is independent, and that he was bound to pay at the time and conformably to the terms of the contract, in consideration of the engagement of Clark, without any tender of performance on the part of the plaintiffs.

The plaintiffs became nonsuit, subject to the opinion of the Court on the above question.

Cobb for the plaintiffs.

W. Baylies and *Battelle* for the defendant.

SHAW, C.J., delivered the opinion of the Court. This is a contract not under seal, but the same rules govern the construction of it as those applicable to cases of covenant. The only question which would seem to be presented by the facts is, whether in a contract between parties, relative to the same subject-matter, some stipulations may be mutual and independent, and others dependent and mutually conditional; and this question was settled in the case of Couch *v.* Ingersoll, 2 Pick. 292. Indeed the point in question constituted distinctly the ground of decision in that case, because the plaintiff, without having tendered performance on his part, recovered on a breach of one covenant because it was independent, and failed on the other, because upon the construction put upon it by the Court, it was dependent.

In the present case, the two first instalments of the purchase-money were to be paid before the time fixed for the conveyance of the land, and therefore it is very clear they are independent. Had a suit been brought for either of them, no tender, offer, or averment of readiness would have been necessary, and no defence could have been made. The obligation of the defendant to pay the money at the times stipulated was absolute and unconditional. But it is shown by the facts that the first two instalments were fully paid; and though payment was not made at the times fixed, yet it was afterward accepted, and the plaintiffs affirmed the contract by suing on it. Then the question is, whether the payment of the last instalment on the one side, and the execution and tender of the deed, upon payment

being made, on the other, were not dependent and conditional; and we think they were. The words are, "and the other half in two years, with interest annually, and the deed to be executed at the completing of the last payment." Suppose the whole had been payable at once, instead of being payable by instalments, and the stipulation had been to pay $700 in two years, the deed to be executed at the payment; upon this statement of the question, is there a doubt that the agreements would have been mutually dependent and conditional? I think not. The intent of the parties is to govern. And what difference is there, whether the final payment is the whole or part, the remainder of the purchase-money having been paid and accepted? Where the whole purchase-money is to be paid at once and the deed is to be then given, the covenants are held to be dependent, because it is unreasonable to presume that the purchaser intended to pay the whole consideration, without having the equivalent, in a title to the land purchased. The same reason applies to the last instalment. An obvious reason why the first and second instalments should be paid without having a deed is, that the vendor was to withhold the title, as a security for the purchase-money, and the vendee was content to rely on the vendor's contract for his future title; but no such reason applies to the final and complete payment of the purchase-money. Whether, therefore, we consider the particular language of the contract, or the general intent of the parties, we think these parts of the contract were mutually dependent and conditional, and the plaintiffs cannot recover without averring performance or an offer to perform on their part.

Plaintiffs nonsuit.

JOSEPH GILES *v.* HENRY GILES.

IN THE QUEEN'S BENCH, MAY 1, 1846.

[*Reported in* 9 *Queen's Bench Reports* 164.]

ASSUMPSIT. The declaration stated that heretofore, to wit, September 21st, 1840, by an agreement then made, by defendant of the first part, plaintiff of the second part, and John Giles of the third part, reciting that Henry Giles the elder (deceased), father of defendant and plaintiff and of Ann Giles, wife of the said John Giles, made his will, dated June 3d, 1839, whereby, after giving an annuity of £30 to plaintiff, and to other parties two other annuities and a legacy, he devised to defendant all his freehold lands in Porthmeor, and all his

leasehold lands in Rosemergee and Bojewyan, *habendum*, the freehold lands to defendant in fee, and the leasehold lands to defendant, his executors, etc., for all such term, etc., as might be to come at the time of testator's death, subject, as to the freehold lands, to the annuities and legacy, and appointed defendant sole executor and residuary legatee and devisee ; reciting also that, by indenture dated March 22d, 1841, between the said H. Giles the elder of the first part, defendant of the second part, and Charles Paynter of the third part, H. Giles the elder demised to Paynter, his executors, etc., for two thousand years, the aforesaid lands in Porthmeor, and assigned to him, his executors, etc., the said leasehold lands in Rosemerger and Bojewyan, for the residue of the terms therein, in trust to pay to H. Giles the elder an annuity, and, subject thereto, upon trust for defendant, his executors, etc.; and reciting further that, by the revocation of the will by the indenture as touching the annuities and legacies charged on the lands, the annuitants and legatee were left wholly unprovided for : defendant, as well in consideration of the natural love and affection which he had and bore for and toward his brother, the plaintiff, the other annuitants, and the legatee, and also for divers other good causes and considerations him thereunto moving, did, among other things, thereby agree to permit and suffer plaintiff to occupy all that part of the said lands and premises in Porthmeor aforesaid then in his possession, until September 29th, 1843, he, plaintiff, paying therefore, on the last-mentioned day, to defendant, as he thereby agreed to do, the sum of £30 as rent for the same, and then to deliver up the same premises to the defendant, his heirs and assigns, in good tenantable repair, and in the meantime to manage, etc., the premises in a good husbandlike manner, etc., and also to permit defendant, his heirs or assigns, to enter, etc. (for certain agricultural purposes) ; "and, upon the plaintiff, his heirs, executors and administrators, so quitting the said premises, paying the said rent, and observing the other stipulations before mentioned, and releasing the defendant, his heirs and assigns, from all claims of and under the said will, as also releasing and quitting claim to the defendant, his heirs, executors, administrators, and assigns, all the freehold and leasehold lands and hereditaments which were of the said testator devised or bequeathed, given, granted or demised, conveyed, or assigned, by or under any former will or settlement of the said Henry Giles, deceased, and which the plaintiff did thereby, for himself, his heirs, executors and administrators, agree to do, he, the defendant, his heirs, executors, administrators or assigns, should and would

well and truly pay unto the plaintiff the sum of £200 with interest," at £4 10*s*. per cent., to be calculated from September 29th, then instant : "And it was by the said agreement further agreed, between the parties thereto, that all deeds or releases to be required by the defendant from any or either of the other parties in pursuance of those presents should be prepared by the attorney of the defendant, his heirs, executors, administrators or assigns, at his or their own expense." (The declaration then set out other stipulations on the part of defendant, not material to the decision of the Court.) And, the agreement having been so made, afterward, to wit, on, etc., in consideration thereof, and that the plaintiff at the request of defendant had then promised, etc.; averring mutual promises of performance. And plaintiff said that he had always, from the making, etc., in all things on his part performed and fulfilled the same ; and that afterward, to wit, on the said September 29th, 1843, "he, the plaintiff, was ready and willing to quit and deliver up the said premises to the defendant, and to pay the said rent ; and the plaintiff further said that, at all times from the making of the said agreement, he, the plaintiff, was ready and willing to release the defendant, his heirs and assigns, from all claim of and under the said will in the said agreement mentioned ; and also to release and quit claim to the defendant, his heirs, executors, administrators and assigns, all the freehold and leasehold lands and hereditaments, which were by the testator aforesaid devised or bequeathed, given, granted, or demised, conveyed or assigned, by or under any former will or settlement of the said Henry Giles, deceased, aforesaid, and to complete and fulfil the said agreement. And although the said September 29th, 1843, did elapse a long time before the commencement of this suit, and although a reasonable time did elapse between the said last-mentioned day and the commencement of this suit, for the payment of the said sum of £200 and interest as aforesaid, according to the said agreement ; of all which," etc. (notice to defendant) ; "and the plaintiff further says that, although no release was prepared by the attorney of the defendant, on or before the said last-mentioned day, under and according to the said agreement, yet the defendant, not regarding the said agreement, nor his said promise, had not as yet paid the said sum of £200 with the interest," etc., although often requested.

Plea 3. That plaintiff was not ready and willing to release the defendant, his heirs, etc., from all claim of and under the will in the agreement mentioned, and also to release and quit claim to defendant, his heirs, etc.; all the freehold and leasehold

lands, etc. (as in the declaration), and to complete the said agreement, in manner and form, etc.; conclusion to the country.

Demurrer, assigning for cause that the plea is a traverse of an immaterial averment in the declaration, and tends to raise an immaterial issue; that the undertaking to release the defendant, his heirs and assigns, as in the agreement set forth, was a distinct and independent undertaking, and was not a condition precedent to, or concurrent with, the payment by defendant to plaintiff of the money. That it was defendant's duty to prepare and tender such release; and that this obligation on his part would not be waived or discharged by the mere fact that plaintiff was not ready or willing to execute it; and that, consequently, the averment of the plaintiff's readiness and willingness (taken *per se*) is wholly immaterial to the result of the action.

Joinder in demurrer.

The demurrer was argued in last Easter Term.[1]

Butt for the plaintiff.

Montague Smith, *contra*.

PATTESON, J., in this Term, May 29th, delivered the judgment of the Court.

The first question in this case is, whether the declaration be sufficient. It is objected to on the ground that the plaintiff has only averred his readiness and willingness to deliver up the premises, to pay the rent, and to release the defendant; whereas the defendant contends that those things were conditions precedent to his paying the £200 under the agreement, and, therefore, that the plaintiff ought to have averred the actual performance of those things. The plaintiff, on the other hand, contends that those things to be done by him, and the payment of the £200 by the defendant, were independent acts altogether; and that his averment of readiness and willingness to do them was unnecessary and not traversable; and that the defendant, in traversing them, has tendered immaterial issues.

We think that the plaintiff is clearly wrong in his view, and that these acts of each party are clearly not independent. The words are, "upon" the plaintiff doing so and so, the defendant promises to pay £200. The time for paying that £200 is not fixed by the agreement itself, and cannot be fixed otherwise than by the plaintiff doing the acts required on his part. The cases collected in note (4) to Pordage *v.* Cole[2] were cited on the argument, and are important; but there are also others cited

[1] May 1st, 1846. Before Lord Denman, C.J., Patteson, Williams, and Wightman, JJ.

[2] 1 Wms. Saund. 320 a, 6th ed.

in note (3) to Peeters *v.* Opie,[1] which are quite as important, and more strictly applicable to the present case. Upon consideration of those cases, and of the intention of the parties to the agreement in this case, as shown by the agreement itself, we are of opinion that the acts to be done by the plaintiff were not condition precedent, not independent, but concurrent with those to be done by the defendant; and, therefore, that it was sufficient for the plaintiff to aver readiness and willingness to do them.

But it was also necessary for him to make that averment. It follows that the averment was traversable; and therefore the plaintiff's demurrer to the pleas, on the ground that they tender immaterial issues, cannot be sustained, except indeed as to the third plea from other reasons.

To the third plea[2] the plaintiff objects that, as it appears by the agreement set out in the declaration that the release to be given to the defendant was to be prepared by the defendant's attorney, and as it is averred in the declaration that no such release was prepared, the plaintiff's readiness and willingness to have executed the release, if prepared, becomes immaterial. And we think that this objection must prevail. If no release was prepared by the defendant's attorney, the plaintiff might sue the defendant for the money, whether he was ready to have executed it or not. Indeed, if none were prepared, it would be difficult for the plaintiff to prove his readiness to have executed; for he was not bound to call upon the defendant to prepare a release, or to offer to execute one. If, on the other hand, a release was prepared by the defendant, he should have pleaded that fact, and shown a refusal by the plaintiff to execute.

Upon the demurrer to this plea, therefore, we think the issue is immaterial, and that the judgment must be for the plaintiff.

Judgment for defendant on demurrer to the second plea; for plaintiff on the demurrer to the third.

[1] 2 Wms. Saund. 352.

[2] Only so much of the case is given as relates to the third plea. — Ed.

DUNHAM & DIMON *v.* PETTEE & MANN.

IN THE COURT OF APPEALS OF NEW YORK, JUNE TERM, 1853.

[*Reported in* 8 *New York Reports* 508.]

THIS was an action brought in the Court of Common Pleas of the City of New York, upon a contract made between the plaintiffs and the defendants in the following form :

"Sold to Messrs. Pettee & Mann, for account of Messrs. Dunham & Dimon, 155 tons (or thereabout) of English bar iron, as per specification of the same, now in public store in this city, at $50 per ton, as per custom-house weigher's return, equal to six months' credit ; but payment for said iron is to be made as follows, to wit : $750 to be paid now, and the balance is to be paid within sixty days from this date, and discount is to be made on the bill at the rate of seven per cent. per annum, reckoning the time from the date of the average payment of the bill until the end of the six months above named. The sellers are to hold a policy of insurance on the iron until the whole amount is paid ; and the buyers are to pay the insurance and all storage expenses from and after this date. It is understood that the iron is to be paid for on delivery (within the sixty days aforesaid), and should the full amount not be paid within the sixty days aforesaid, Messrs. Dunham & Dimon will be at liberty to sell the iron to other parties, for account of Messrs. Pettee & Mann.

"New York, March 12th, 1849.

"NATHAN CASWELL, Broker."

The contract was set out in the complaint, and it was alleged that the defendants paid the sum of $750 mentioned in it, and that the plaintiffs were ready and willing to deliver the iron to the defendants and receive the balance of the price therefor, and in all respects to comply with the terms of the contract on their part, and that they within the sixty days mentioned in the contract offered and tendered to the defendants the iron, but that the latter were not ready and willing to receive it and pay the balance of the price, and wholly refused so to do. The defendants answered admitting the contract, but denied that the plaintiffs were ready or willing to comply with its terms, or that they offered or tendered the iron to the defendants, and alleged that the defendants were ready and willing to receive the iron and to pay for it on delivery, and that they demanded

its delivery of the plaintiffs, but that they were not able to deliver it and refused to deliver it. The plaintiff replied denying the allegations in relation to their refusal to deliver the iron.

The cause was tried in March, 1850. It was proved by the plaintiff that at the time the contract was entered into, the iron was stored in the United States bonded warehouse, where it remained until it was delivered to D. M. Wilson & Co., in October or November, 1849; that after May 23d, 1849, the storage upon it up to that day was paid by the plaintiffs; that the storekeeper requires a permit from the custom-house before he will deliver the iron; that he always delivered goods stored without requiring payment of the storage where he knew and had confidence in the parties; that in this case he would have delivered the iron, and he ultimately did deliver it without payment of the storage. The plaintiffs also proved that on May 11th, 1849, their clerk went to the defendants' office and delivered to the defendant Pettee a bill of the iron. Mr. Pettee told him they wanted the custom-house permit, so that they could get the iron; and that they had sold the iron to D. M. Wilson & Co., and wanted to deliver it and get their notes in order out of their proceeds to pay the plaintiffs. The clerk then went to the plaintiffs' office and obtained the custom-house permit and returned with it to the defendants' office at 25 minutes before 3 o'clock, when he was informed that Mr. Pettee was not in and would not be until 6 o'clock, and that he had left no check to pay for the iron. The clerk handed the permit to the defendants' clerk, but did not leave it with him, he having been ordered to bring it back if he did not get a check for the amount of the bill. It was also shown that on May 15th, 1849, it was agreed between the plaintiffs and defendants that the plaintiffs might dispose of the iron to D. M. Wilson & Co., upon a sale which had been agreed upon between the latter house and the defendants, at $41 per ton payable in six months, and without prejudice to the claim of plaintiffs for the difference in the price to be paid by D. M. Wilson & Co. and that contracted to be paid by the defendants, or to the defendants' claim for a restoration of the advance of $750 made by them. The plaintiffs then showed the weight of the iron and rested.

The defendants' counsel thereupon moved for a nonsuit upon the following grounds:

"1. That there must be an actual delivery or tender of the iron before the plaintiffs can recover. 2. That a symbolical delivery is only good where the vendee accepts. That the worst construction that can be put upon the contract between the parties is, that payment and delivery are simultaneous acts.

3. That if a symbolical delivery is good, then the plaintiffs have not made such delivery or offer to deliver."

The motion for a nonsuit was overruled, and the defendants' counsel excepted.

The defendants' counsel then called Caswell, the broker, who made the sale. He testified that on May 8th, at the request of the defendants, he made sale of the iron to D.M. Wilson & Co., at $41 per ton payable in six months ; that at the defendants' request, on May 9th, he told one of the plaintiffs that he was requested by Mr. Pettee to say that the defendants were ready to take the iron and wished it delivered, to which he replied, "Very well, he would attend to it." The defendants then proved that on May 11th, between 12 and 1 o'clock, they sent their clerk to the plaintiffs' office to get the permit so that they might obtain the iron, and that one of the plaintiffs told him that the defendant Dimon was gone to the custom-house for it, but that they would not deliver it until the money was paid, but that the clerk had no money to offer or tender.

The testimony being closed, the defendants' counsel requested the Court to charge the jury as follows :

1. The contract taken together shows that the sixty days prescribed therein were given for the benefit of the buyers, and it cannot be so construed as to make payment for the iron a condition precedent to delivery. It cannot be construed more unfavorably for the buyers than to make the payment and delivery concurrent acts.

2. The defendants have all of the sixty days within which to take the iron, and the plaintiffs should be ready to deliver at all times within the sixty days.

3. There was a sufficient demand by the defendants within the sixty days to put the plaintiffs in default.

4. The rights of the parties were thereby determined, and the acts on the part of the plaintiffs in presenting the bill were nugatory.

5. The plaintiffs, by their acts of May 11th did not put the defendants in default. There was no tender or offer by the plaintiffs to invest the defendants with the possession of the iron, or the right to its immediate possession.

6. The plaintiffs were bound to show that they did offer and tender the iron within the time specified in the contract.

The Court declined so to charge, and in charging the jury commented upon the various rules of law in relation to the performance of contracts of sale, and the rights of vendors and vendees, and instructed them that the principal question for them to decide was, "Have the defendants on their part during

the sixty days demanded the iron, and in readiness to pay on their part, demanded the delivery; that going through the form of a demand without the ability or intention to pay, could not put the plaintiffs in default; that if under such directions they should find for the plaintiffs, they would give them the difference between what they had received on the sale to D. M. Wilson & Co. and the contract price, with the expenses." The defendants seasonably excepted to the charge and the omission to charge as requested. The jury found a verdict for the plaintiffs for $753.38, and judgment was entered thereon.

The defendants appealed to this Court.

N. Hill, Jr., for appellants.

A. Taber for respondents.

RUGGLES, C.J. Under the contract of sale, the delivery of the iron and the payment of the money were things to be done at one and the same time. The plaintiffs were not bound to deliver the iron unless the defendants at the same time paid the money; and the defendants were not bound to pay the price unless the plaintiffs at the same time delivered the thing sold, or was ready to deliver it. The obligations to deliver on the one part and to pay on the other, were mutual and dependent. If the buyer in a case of this sort fails to pay or offer to pay within the time specified for mutual performance, the seller is discharged from liability to answer in damages for not delivering the thing sold. But it does not follow that the seller, in such case, is entitled from the mere default of the buyer to recover the purchase-money. To entitle the seller to recover the price, he must show not only that the purchaser failed to pay, but that he himself was ready and offered to deliver the goods. 12 Johns. 209; Porter *v.* Rose, 20 Johns. 130.

The issue between the parties was framed upon a correct view of the legal question between them. The plaintiffs averred that they were ready and willing, and offered to deliver the iron within the time specified in the contract, and this averment was denied by the defendants in their answer; and this was the question which ought to have been put to the jury. Instead of that the judge charged the jury that the principal question for them to decide was, "Have the defendants on their part during the sixty days demanded the iron, and in readiness to pay on their part offered to pay the money on delivery?" If this had been an action by the purchaser against the seller, for the non-delivery of the goods, the charge would have been right, because the purchaser is bound, on a contract of this kind, to show a readiness and an offer to perform before he can require the seller to deliver. Whichever party seeks to enforce the

contract against the other must show performance or tender of performance. Until that be shown he is himself in default. The plaintiffs in this case are seeking to enforce the contract, and the judge should have told the jury that to entitle them to recover they were bound to show an offer of performance, whether the defendants were ready or not. But the case was put to the jury on the question whether the defendants had offered to pay ; and if they had not, the jury were instructed in effect to find for the plaintiff, whether he had offered to deliver or not, thus making the payment by the defendant a duty precedent to the delivery when in truth it was concurrent merely ; and allowing the plaintiff to recover in a case in which neither party had shown a readiness and offer of performance. In this the judge charged erroneously, and on this ground the judgment below must be reversed and a new trial ordered.

This is not done without some reluctance, because if the case had been properly left to the jury on the question whether the plaintiffs were ready and offered to perform on their part, we think the jury might well have found in their favor.

The plaintiffs sent to the defendants' office the bill for the iron, and the custom-house permit, authorizing the delivery of the iron to Dunham & Dimon. It is said that this permit should have been endorsed by the plaintiffs ; in other words, that there should have been an order by Dunham & Dimon on the storekeeper for the delivery of the iron to the defendants. But the permit was not objected to on that ground. If it had been, the endorsement or order could have been immediately made or obtained. And without it the offer seems to have been sufficient, because payment by the defendants would have given them a title to the goods ; and the contract of which the purchaser must be supposed to have the counterpart, together with the clerk's receipt for the money on the bill, and the unendorsed permit, would have entitled the defendants to the iron from the public storekeeper. These papers were equivalent to an order on the storekeeper for the delivery of the iron. But the bargain was in fact broken off because the defendants refused to pay the money on the delivery of the goods, and not because the custom-house permit was unendorsed. Pettee, one of the defendants, told the plaintiffs' clerk that he wanted the iron to deliver to Wilson & Co., so that the defendants might raise the money by means of the notes which Wilson & Co. were to give for it. The plaintiffs were excused from doing more than was actually done toward performance on their part by the virtual refusal of Pettee to pay, until he could raise the money on the notes he expected to get from Wilson & Co.; and by what was

said by defendants' clerk after Pettee had gone—namely, that Pettee had left no check, and that it was useless to wait until he returned. It was shown that the storekeeper would have delivered the iron without payment of the storage due previous to the date of the contract It was not necessary to bring the iron to the defendants' office and tender it there. The offer to deliver seems to have been made in good faith, and to have been a substantial compliance with the duty under the contract.

But the defendants are entitled to have this question submitted to a jury to be determined according to such evidence as may be produced on another trial.

GARDINER, JEWETT, JOHNSON, and TAGGART, JJ., concurred with the Chief Judge.

MORSE and WILLARD, JJ., dissented, and were for the affirmance of the judgment.

MASON, J., did not hear the argument.

Judgment reversed and a new trial ordered.

PLINY CADWELL AND ANOTHER *v.* EZEKIEL BLAKE AND ANOTHER.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, SEPTEMBER TERM, 1856.

[*Reported in* 6 *Gray* 402.]

ACTION OF CONTRACT commenced on April 5th, 1854, by the assignees in insolvency of David Ames and John Ames, upon an agreement in writing made by the latter with the defendants on January 26th, 1853.

The following are the material parts of that agreement: "The said D. & J. Ames hereby sell to the said Blake & Valentine all the right, title, and interest which the said D. & J. Ames have in the machinery and fixtures now at their paper mill at Chicopee Falls. They also agree that said Blake & Valentine shall have the right which said D. & J. Ames have to manufacture white paper, made from straw and other materials; which right has been assigned to said D. & J. Ames by Jean Theodore Coupier and Marie Amadee Charles Millier, and as described in the application of said D. & J. Ames for letters patent of the United States. They also agree to instruct the said Blake & Valentine fully in the art and mystery of preparing the straw and other materials, and manufacturing the same into paper, and to communicate to them from time to time all the improve-

ments which they, the said D. & J. Ames, shall make in said art, and give them the benefit thereof, which instructions the said Blake & Valentine are to keep secret so far as secrecy can be preserved consistently with their business.

"The said Blake & Valentine are to pay for said machinery and fixtures $4000, in four equal annual payments, with annual interest from date. Payment is to be made in paper, manufactured according to the process above mentioned, at the market price of such paper at the time when each payment shall become due, the paper to be delivered at the Western Railroad freight depot in Springfield. They also agree to take possession of said machinery and fixtures by July 4th next, and proceed as soon as may be with the manufacture; and to pay to said D. & J. Ames, for the right to manufacture said white paper," a certain share of the profits if the profits exceed 2 cents a pound; otherwise nothing.

"If any dispute or disagreement shall arise between the parties in regard to the estimate of the profits, it shall be referred to three disinterested men, one to be chosen by each party, and the third by the two referees, and the award shall be binding on the parties."

"If the said D. & J. Ames shall, upon request, refuse to teach the said Blake & Valentine the art of making said paper as above mentioned, they shall forfeit, as liquidated damages, distinct from all the other liabilities under this contract, the sum of $4000."

The declaration set forth the agreement, and averred that David Ames and John Ames delivered said machinery and fixtures to the defendants according to the terms thereof, and the defendants accepted and received the same; that the defendants owed the plaintiffs therefor the sum of $1000 with interest, and also the interest due on $4000, as therein stipulated; and that the plaintiffs had been ready to receive the paper therein specified, yet the defendants had not delivered the same, but had refused so to do.

Answer, first. That the defendants entered into said agreement, upon the consideration and for the purpose of securing the right to manufacture white paper from straw by the process therein named, and of obtaining the necessary instructions in said art and mystery; that D. & J. Ames and the plaintiffs had failed to fulfil their contract in this behalf, and had neglected and refused to secure to the defendants the right to manufacture according to said process, and to instruct them in the art and mystery thereof, although repeatedly requested by the defendants so to do, and had prevented the defendants from using

said process. Second. That there had been a failure of consideration for the contract on their part; that said machinery and fixtures were of no value to them without said instructions and said right to manufacture; and they had offered to return them. Third. That D. & J. Ames were not the proprietors of said right to manufacture, and had not at the time, nor obtained since, any effectual assignment thereof, or any right to contract with the defendants therefor; or else had failed to avail themselves of such assignment, and had abandoned, lost, and suffered themselves to be deprived of the right to use said process, and of the patent issued therefor; whereby their agreement to give the defendants such right had been defeated, and the defendants prevented from using said process and from manufacturing said paper. Fourth. That the defendants, by such failure to secure to them said right and to give them such instructions, had been prevented from fulfilling the agreement on their part. Fifth. That D. & J. Ames were requested to teach the defendants the art and mystery of making said paper according to said process, but neglected and refused so to do, and thereby incurred a forfeiture under said agreement of the sum of $4000 as liquidated damages, which the defendants claimed the right to apply to offset and cancel all claims of the plaintiffs under the agreement.

At the trial in this Court the defendants admitted the execution of the agreement, and the delivery to them of possession of the paper mill, machinery, and fixtures about March 1st, 1853. The plaintiffs then rested their case.

The defendants contended that the plaintiffs were not entitled to recover without proving "First, that D. & J. Ames had such an assignment of the right as their contract states; second, that they had availed themselves of it, and made it effectual to secure to themselves the patent, or at least a right to manufacture under it for themselves and the defendants; third, that they had conveyed or secured to the defendants the right to use the process; fourth, that they had instructed the defendants in the art of making said paper."

The plaintiffs denied that it was necessary for them to offer any further evidence, or that any of the matters alleged in the answer constituted a good defence to the action.

Bigelow, J., ruled that the plaintiffs had made out a *prima facie* case, and would be entitled to a verdict, unless the defendants went forward and offered evidence of the matters set out in their answers; and reported the case for the determination of the full Court upon these two questions: First, the correctness of his ruling as to the sufficiency of the case as pre-

sented by the plaintiffs ; second, the sufficiency of the grounds of defence set forth in the answer ; a new trial to be had if, upon either of these points the opinion of the Court should be in favor of the defendants.

The arguments and decision upon this report were had at the last September Term.

W. G. Bates & J. Wells for the defendants.

F. Chamberlin for the plaintiffs.

SHAW, C.J. No question arises in the present case as to the pleading ; the declaration is perhaps sufficient, under the new practice act, to enable the plaintiffs to recover, inasmuch as it does briefly aver the performance on the part of D. & J. Ames, and the plaintiffs, their assignees in insolvency, of all things on their part, by the terms of the contract to be performed. But it is a question of proof ; did the plaintiffs offer sufficient proof of performance on their part to enable them to recover ? This again depends on the construction of the contract, and whether, according to its true interpretation, the stipulation for the payment of $4000 and interest, in paper to be manufactured by the process contemplated by the contract, was independent, and to be performed absolutely by such payment ; or was it dependent and conditional, and to be performed only on condition that certain other things should be first performed on the part of the said D. & J. Ames ?

The contract consists of several articles on both sides, is expressed in terms somewhat brief, and it is not easy to gather from it the full and clear intent of the parties. The great purpose of the contract seems to have been for D. & J. Ames to transfer to the defendants a right, a useful and beneficial right, to manufacture and sell white paper in so cheap a manner and in such quantities as to yield a profit, which right D. & J. Ames had acquired so far as it could be acquired by assignment before patent, and of which they were expecting to become the patentees by a patent to be regularly issued by the competent authority of the United States. The particular right is not otherwise specifically described and identified than as a right which had been assigned to them by Coupier & Millier, and as described in the application of D. & J. Ames for letters patent. It manifestly looked to the expectation that D. & J. Ames were to be the patentees, because they were the assignees and had applied for a patent, and because they stipulated to extend to the defendants all the benefit of the improvements which they should make.

In construing a mutual agreement, in which there are several stipulations on both sides, the question whether one is absolute

and independent, or conditional and made to depend on something first to be done on the other side, does not depend on any particular form of words, or upon any collocation of the different stipulations; but the whole instrument is to be taken together, and a careful consideration had of the various things to be done to decide correctly the order in which they are to be done.

It is contended that, as the machinery and fixtures were to become the property of the defendants at once, at a fixed price of $4000, payable at a certain time, they were to pay for them at all events, whether the manufacture of paper by the new process should go on or not. There would be more force in this argument if it appeared that the fixtures and machinery thus sold were adapted to the general purposes of paper-making, and had a market value, independently of the new process, and especially if the time for making the payment had been fixed at a time before the acts to be done on the other side.

But in this case, for aught that appears, the machinery and fixtures would be of little value except for manufacturing by the new process. And possibly the defendants may have stipulated to pay a sum greater than their value for these articles, in consideration of the advantages expected from the whole contract.

The stipulation that the price of the machinery and fixtures should be paid at a fixed time, affords no criterion for determining that the stipulation is independent, because there was ample time before the first payment for D. & J. Ames to transfer the machinery, afford all the necessary instruction, execute and deliver a license conveying to the purchasers a right to manufacture, and do all other acts relied on as conditions precedent.

But the strong ground on which the court are of opinion that these acts of D. & J. Ames were conditions precedent is, that these payments were to be made by a delivery of paper, to be manufactured by this new process from straw and other materials at the then market value. This process is recognized and represented in the contract itself as an art and mystery, to be kept secret as far as practicable, not yet patented, and of which, therefore, there was no specification in the patent office, from which the process could be learned. The machinery sold may have been that of the inventors adapted to the making of paper by this process.

It seems to us that these two stipulations—to deliver the machinery, and to give the instruction—stand upon the same footing, because both were necessary to the making of paper by this process. The stipulation to instruct in the art and mystery

was absolute and affirmative, like that to deliver the machinery not dependent on request. There was a distinct stipulation, that if they should refuse to instruct, on request, they should be liable to liquidated damages ; but it has a distinct object, and does not supersede the other.

Without instruction in this art and mystery, the defendants might not know the method of preparing the straw and using the machinery ; without these this kind of paper could not be made, it could have no market price, the defendants could not make it, and of course could not deliver it.

When, in the order of events, the act to be done by the one party must necessarily be done before the other can be done, it is necessarily a condition precedent, although there be a stipulation for liquidated damages for the breach on each side, and although there be a fixed future time for payment sufficiently distant to have the work done in the mean time. Suppose B. agrees to build, at his own shop, a carriage for A., of A.'s materials ; A. stipulates seasonably to furnish materials, and to pay B. in four months ; and each, upon failure, stipulates to pay a sum as liquidated damages. The furnishing or tendering the materials by A. is a condition precedent. Without it B. cannot perform. He must build it of A.'s materials. Even building it of his own would not be a performance. B. has his shop, his tools, and his workmen all ready, but A. does not furnish the materials. If B. sues A., averring readiness to perform, he may recover. But if A. sues B. for not building the carriage, it would be a good answer that A. himself had not furnished the materials, because whatever else the contract may contain. this is in its nature a condition precedent.

The Court are, therefore, of opinion that the plaintiffs, as a part of their own case, should not only have averred, but should have offered proof at the trial that D. & J. Ames gave full and ample and reasonable instruction to the defendants, or—which is of the same legal effect, in matters of contract for doing specific acts—that they tendered and offered such instruction in regard to the preparation of the material and the use of the machinery, to enable them to make the paper in the manner and of the material proposed, which the defendants declined receiving.

The Court are also inclined to the opinion that the legal effect of the stipulation of D. & J. Ames with the defendants was, that they should have a full right to manufacture paper by the process therein indicated, whatever the nature of the right then was or might become by the obtaining of a patent, which it appears by the contract they expected to obtain, or in failure of such patent, such right as they should hold from the assign-

ment to them by Coupier & Millier. They were embarking in a new and expensive enterprise ; and should another person obtain a patent, which might happen, they might be placed in a situation in which they could not carry on the manufacture without infringing the right of another. If the patent was obtained by D. & J. Ames, it seems to us that they should have tendered to the defendants an assignment of the patent, or at least a right under it ; or that, if the application was still pending, or had been denied, and there was no patent, that fact should have been averred. But we have not placed our decision ordering a new trial mainly on that ground, but throw out the suggestion for the consideration of parties should a new trial be had.

But there is another ground upon which the Court are of opinion that a new trial ought to be had. Perhaps both points reserved in the report depend substantially upon the same question of construction of this contract—namely, whether any of the stipulations of D. & J. Ames constituted conditions precedent ; because if they did, and so far as they did, and the defendants have averred the performance of them, they would, if proved by the defendants, as they offered to do, be a good defence. Upon looking at the answer, we think that, even if the plaintiffs had made out a *prima facie* case, several of the facts stated in the answer would have been competent for the defendants to prove ; and if proved, would have been available in defence, either by way of bar, or in reduction of damages.

New trial ordered.

The plaintiffs then amended their declaration by inserting an averment "that the said D. & J. Ames instructed the defendants in the art and mystery of preparing the straw and other materials, and manufacturing the same into paper, and offered them further instructions if they should need it, and full examination of the premises of the said D. & J. Ames, and permission to take dimensions, and to be shown the use and application of whatever they might desire to inquire about, and to give them all needful information which they should require."

The defendants demurred to the declaration, for that it did not state a legal cause of action, substantially in accordance with the rules contained in the St. of 1852, ch. 312 ; "because it does not allege that the plaintiffs, or said D. & J. Ames, had secured to the defendants the right to manufacture paper by the process named in said contract, nor that the defendants have the right to manufacture according to the terms of the contract."

Bates & Wells for the defendants.

R. A. Chapman & Chamberlin for the plaintiffs.

SHAW, C.J. The Court are of opinion that this demurrer is well taken and must be sustained. It is true there is no warranty in terms of a right to manufacture paper by the process referred to, but we think such a warranty and condition results from the provisions of the contract, the whole of which must be taken together. D. & J. Ames agree that the defendants shall have the right to manufacture white paper from straw and other materials, which right has been assigned to D. & J. Ames by Coupier & Millier. It is not merely hypothetical, such right as they have, if they have any ; but an express stipulation that they shall have the right, and an affirmative averment of the fact, that it has been assigned to them, so that they have the power to assure it, with an intimation that the assignment is of such a character as to induce them to apply for a patent, which, if granted, would secure to them an exclusive right. If they had such an assignment, whether they obtained a patent or not, it would prevent any other person from obtaining a patent so as to exclude them from the right. Such a stipulation, accompanied with such an express undertaking that they held such an assignment, amounted to a stipulation that no other person should have such right as to exclude them therefrom, and that, either by a grant of the patent right from D. & J. Ames if they obtained one, or by common right if none should be obtained, the defendants should have the right to manufacture by this new and peculiar process. When we consider that the whole object of the contract was to enable the defendants to manufacture by this process ; that the consideration of the undertakings of the defendants was their right and power so to manufacture paper ; that the debt was to be paid in paper thus to be manufactured ; that without such right the machinery and fixtures might be of little value to them, and the teaching of an art they could not practise without infringing the rights of others, wholly useless, the conclusion seems inevitable that the enjoyment of a right to use this art and process, patented or unpatented, was regarded by the parties as a condition without a performance of which, on the part of D. & J. Ames, or those who claim under them, the defendants are not bound to make the stipulated payments.

Demurrer sustained.

BEHN *v.* BURNESS.

IN THE EXCHEQUER CHAMBER, FEBRUARY 24, 1863.

[*Reported in* 3 *Best & Smith* 751.]

THE defendant having brought error on the judgment in this case (see the report in the Court below, Vol. I., p. 877), it was argued, on November 26th, 1862, before Erle, C.J., Pollock, C.B., Williams and Keating, JJ., and Channell, B.

Honyman (*Bovill* with him) for the defendant.

Manisty (*Maclachlan* with him), *contra*.

The judgment of the Court was now delivered by

WILLIAMS, J. The question in this case is whether the statement in the charter-party, that the ship is "now in the port of Amsterdam," is a "representation" or a "warranty," using the latter word as synonymous with "condition;" in which sense it has been for many years understood with respect to policies of insurance and charter-parties.

It may be expedient to commence the consideration of this question by some examination into the nature of representations. Properly speaking, a representation is a statement, or assertion, made by one party to the other, before or at the time of the contract, of some matter or circumstance relating to it. Though it is sometimes contained in the written instrument, it is not an integral part of the contract; and, consequently, the contract is not broken though the representation proves to be untrue; nor (with the exception of the case of policies of insurance, at all events marine policies, which stand on a peculiar anomalous footing) is such untruth any cause of action, nor has it any efficacy whatever, unless the representation was made fraudulently, either by reason of its being made with a knowledge of its untruth, or by reason of its being made dishonestly, with a reckless ignorance whether it was true or untrue. See Elliot *v.* Von Glehn, 13 Q. B. 632; Wheelton *v.* Hardisty, 8 E. & B. 232.[1]

If this be so, it is difficult to understand the distinction which is to be found in some of the treatises, and is in some degree perhaps sanctioned by judicial authority (see Barker, appellant, Windle, respondent, 6 E. & B. 675, 680), that a representation, if it differs from the truth to an unreasonable extent, may affect the validity of the contract. Where, indeed, the misrepresentation is so gross as to amount to sufficient evidence of fraud, it is obvious that the contract would on that ground be voidable.

[1] On appeal, 8 E. & B. 285.

The representations are not usually contained in the written instrument of contract, yet they sometimes are. But it is plain that their insertion therein cannot alter their nature. A question, however, may arise, whether a descriptive statement in the written instrument is a mere representation, or whether it is a substantive part of the contract. This is a question of construction which the Court, and not the jury must determine. If the Court should come to the conclusion that such a statement by one party was intended to be a substantive part of his contract, and not a mere representation, the often-discussed question may, of course, be raised, whether this part of the contract is a condition precedent, or only an independent agreement, a breach of which will not justify a repudiation of the contract, but will only be a cause of action for a compensation in damages. In the construction of charter-parties, this question has often been raised, with reference to stipulations that some future thing shall be done or shall happen, and has given rise to many nice distinctions. Thus a statement that a vessel is to sail, or be ready to receive a cargo, on or before a given day, has been held to be a condition (see Glaholm *v.* Hays, 2 M. & G. 257; Oliver *v.* Fielden, 4 Exch. 135; Croockewit *v.* Fletcher, 1 H. & N. 893; Seeger *v.* Duthie, 8 C. B. N. S. 45), while a stipulation that she shall sail with all convenient speed or within a reasonable time, has been held to be only an agreement. See Tarrabochia *v.* Hickie, 1 H. & N. 183; Dimech *v.* Corlett, 12 Moo. P. C. C. 199; Clipsham *v.* Vertue, 5 Q. B. 265. But with respect to statements in a contract descriptive of the subject-matter of it, or of some material incident thereof, the true doctrine, established by principle as well as authority, appears to be, generally speaking, that if such descriptive statement was intended to be a substantive part of the contract, it is to be regarded as a warranty—that is to say, a condition on the failure or non-performance of which the other party may, if he is so minded, repudiate the contract in toto, and so be relieved from performing his part of it, provided it has not been partially executed in his favor. If, indeed, he has received the whole or any substantial part of the consideration for the promise on his part, the warranty loses the character of a condition, or, to speak perhaps more properly, ceases to be available as a condition, and becomes a warranty in the narrower sense of the word—viz., a stipulation by way of agreement, for the breach of which a compensation must be sought in damages. See Ellen *v.* Topp, 6 Exch. 424–441; Graves *v.* Legg, 9 Exch. 709–716; adopting the observations of Williams on the case of Boone *v.* Eyre, 1 H. Bl. 273, note *a*, in 1 Saund.

320 d, 6th ed.; Elliott *v.* Von Glehn, 13 Q. B. 632. Accordingly, if a specific thing has been sold, with a warranty of its quality, under such circumstances that the property passes by the sale, the vendee having been thus benefited by the partial execution of the contract, and become the proprietor of the thing sold, cannot treat the failure of the warranty as a condition broken, unless there is a special stipulation to that effect in the contract (see Bannerman *v.* White, 10 C. B. N. S. 844) ; but must have recourse to an action for damages in respect of the breach of warranty. But in cases where the thing sold is not specific, and the property has not passed by the sale, the vendee may refuse to receive the thing proffered to him in performance of the contract, on the ground that it does not correspond with the descriptive statement, or, in other words, that the condition expressed in the contract has not been performed. Still if he receives the thing sold, and has the enjoyment of it, he cannot afterward treat the descriptive statement as a condition, but only as an agreement, for a breach of which he may bring an action to recover damages.

In the present case, as the defendant has not received any benefit or advantage under the contract, but has wholly repudiated it, the question is simply whether, in the true construction of the charter-party, the Court ought to infer that the statement as to the ship's being at that date in the port of Amsterdam, was meant to be a substantive part of the contract, or a representation collateral to it. And this question appears to be properly raised by the averment in the plea, that time, and the situation of the vessel, were essential and material parts of the contract. On the trial of the issue joined thereon, it was no part of the judge's duty to leave to the jury any question as to the construction of the contract, or the materiality of any of its statements. It was his function to construe the contract with the aid of the surrounding circumstances found by the jury, and to decide for himself whether the statement that the ship was in the port, supposing it to be untrue, was an essential part of the contract, or a mere representation, and to direct the jury to find for the defendant or plaintiff accordingly. The question, it should seem, might also be raised by pleading the material circumstances (as was done in Graves *v.* Legg, 9 Exch. 709) on which the defendant relies as leading to the construction which the plea seeks to put on the instrument. Unless one or other of these modes of pleading were adopted, the Court, in case there should be a demurrer to the plea, or on an application for judgment *non obstante veredicto*, would be precluded from

taking the surrounding circumstances into consideration in aid of the construction.

It is plain that the Court must be influenced in the construction, not only by the language of the instrument, but also by the circumstances under which, and the purposes for which, the charter-party was entered into. For instance, if it was made in the time of war, the national character of the vessel is of such importance, that a statement of it in the charter party might properly be regarded as part of the shipowner's contract, and so amounting to a warranty ; whereas, the very same statement in the time of peace, being wholly unimportant, might well be construed to be a mere representation. So if it were shown that the charter-party was made for a purpose such that, unless the vessel began her voyage from the port of loading, with her cargo on board, by a certain time, it was manifest that the object of the charter-party would in all probability be frustrated, the Court might properly be led by this circumstance to conclude that a statement as to the locality of the ship, coupled with a stipulation that she should sail with all convenient speed, was a warranty of her then locality. But we feel a difficulty in acceding to the suggestion which appears to have been, to some extent, sanctioned by high authority (see Dimech *v.* Corlett, 12 Moo. P. C. C. 199), that a statement of this kind in a charter-party, which may be regarded as a mere representation if the object of the charter-party be still practicable, may be construed as a warranty if that object turns out to be frustrated ; because the instrument, it should seem, ought to be construed with reference to the intention of the parties at the time it was made, irrespective of the events which may afterward occur. It is true that in some of the cases, where the question has been whether a stipulation in a charter-party amounted to a condition, the Court decided that question in the negative, and in so doing took occasion to suggest that neglect or delay on the part of the shipowner to execute his part of the contract, might be a breach of such an essential stipulation on his part as to justify the charterer in treating the contract as brought to an end thereby, and in refusing on that account to perform his part of it, and further suggested that, in deciding whether the breach on the shipowner's part was of such an essential stipulation as that described, the Court might advert to the fact whether such breach had frustrated the whole object which the charterer had in view. See Freeman *v.* Taylor, 8 Bing. 124; Tarrabochia *v.* Hickie, 1 H. & N. 183; Dimech *v.* Corlett, 12 Moo. P. C. C. 199, 224, 227. But the Court did not, we apprehend, mean to intimate that the frustration of the voyage would

convert a stipulation into a condition, if it were not originally intended to be one.

The question on the present charter-party is confined to the statement of a definite fact—the place of the ship at the date of the contract. Now the place of the ship at the date of the contract, where the ship is in foreign parts and is chartered to come to England, may be the only datum on which the charterer can found his calculations of the time of the ship's arriving at the port of loading. A statement is more or less important in proportion as the object of the contract more or less depends upon it. For most charters, considering winds, markets, and dependent contracts, the time of a ship's arrival to load is an essential fact, for the interest of the charterer. In the ordinary course of charters in general it would be so ; the evidence for the defendant shows it to be actually so in this case. Then, if the statement of the place of the ship is a substantive part of the contract, it seems to us that we ought to hold it to be a condition upon the principles above explained, unless we can find in the contract itself or the surrounding circumstances reason for thinking that the parties did not so intend. If it was a condition and not performed, it follows that the obligation of the charterer dependent thereon, ceased at his option, and considerations either of the damage to him or of proximity to performance on the part of the shipowner are irrelevant. So was the decision of Glaholm *v.* Hays, 2 M. & G. 257, where the stipulation in a charter of a ship to load at Trieste was that she should sail from England on or before February 4th, and the non-performance of this condition released the charterer, notwithstanding the reasons alleged in order to justify the non-performance. So in Ollive *v.* Booker, 1 Exch. 416, the statement in the charter of a ship which was to load at Marseilles was that she was "now at sea, having sailed three weeks ago," and it was held to be a condition for the reasons above stated. And we would note that the marginal abstract of this case states the stipulation to have been "having sailed three weeks ago or thereabouts." If the statement had really been so indefinite, it may be that the Court would have come to a different conclusion.

We think these cases well decided, and that they govern the present case. We think that the decision of Dimech *v.* Corlett, 12 Moo. P. C. C. 199, does not conflict with them, because it is immersed in the specific facts there set out, so as to be a precedent only for cases with very analogous specific facts. The statement in that charter, that the ship was "now at anchor in this port' (Malta), did not avail to release the charterer, be-

cause the ship was in the port in the dry dock ; and although the statement of the fact that she was at anchor in the port was definite, and indicated that she was ready for sea, while in truth she was in a dry dock being built, and was not completed for a month, yet, as the defendant was at Malta, and was presumed to have known the state of the ship, and also to have known of the delay, and did not insist that the charter-party was broken, but allowed the ship to sail from Malta for Alexandria without objection, his defence on this point failed.

The Court below in a manner referred the present case to a court of error to say whether the decision should be governed by Ollive *v.* Booker, 1 Exch. 416, or Dimech *v.* Corlett. We are of opinion, for the reasons assigned, that the decision of Ollive *v.* Booker was sound, and that it governs our decision here ; and we are further of opinion that, in so holding, we do not at all conflict with the decision in Dimech *v.* Corlett, as above explained.

On these grounds we think that the judgment of the Queen's Bench should be reversed.

Judgment reversed.

LOUD *v.* POMONA LAND AND WATER COMPANY.

IN THE SUPREME COURT OF THE UNITED STATES, MAY 19, 1894.

[*Reported in* 153 *United States Reports* 564.]

THE Pomona Land and Water Company, defendant in error, a corporation duly organized under the laws of the State of California, brought this action of covenant against Henry M. Loud, a citizen of the State of Michigan, to recover various sums of money due upon agreements under seal, embodied in twenty contracts and nine applications for the sale and purchase at different prices, of separate and distinct parcels of land lying and being in the State of California, together with designated shares of stock in certain irrigation companies.

The twenty contracts declared on in counts one to forty inclusive are substantially the same in form, the difference between them being in the dates, description of land, purchase price, time of payment, and the number of shares of stock in the irrigation companies. The applications declared on in counts forty-one to forty-nine inclusive, while relating to different parcels of land, and varying in dates, purchase-price, time of payment, etc., are also substantially alike.

These several contracts and applications need not be separately noticed or considered. One class is represented and illustrated in the contract set out in the first count of the declaration, while the other is set out according to its legal effect in the forty-first count of the declaration. The contract declared on in the first count is as follows :[1]

"This agreement, made April 8th, 1887, between Pomona Land and Water Company, a corporation duly organized under the laws of the State of California, and having its office and principal place of business in the town of Pomona, county of Los Angeles, State of California, party of the first part, and H. M. Loud, of Oscoda, Mich., party of the second part, witnesseth, that in pursuance of a resolution of its board of directors, adopted October 25th, 1883, A.D., and in consideration of $2539, paid by the party of the second part, the party of the first part does covenant and agree that after the making of the payments and full performance of the covenants hereinafter expressed to be made and performed by the party of the second part, the party of the first part will, in consideration thereof, convey by deed of grant, bargain, and sale, to the party of the second part, his heirs or assigns, the following described real property situated in the county of Los Angeles, State of California, to wit, Lot seventeen (17) of the northeast Pomona tract, according to the map of said tract duly recorded in book 5, page 461 of miscellaneous records of Los Angeles County, Cal., estimated to contain 40.62 acres of land, together with 406.2 shares of stock of the Del Monte Irrigation Company, representing 4.062 inches of water under 4-inch pressure, measured from centre of aperture, said stock to be delivered by the party of the first part and accepted by said party of the second part, subject to the by-laws of the said Del Monte Irrigation Company, when payment in full is made for the above-described land.

"The party of the first part reserves the exclusive right of way for laying pipes and aqueducts for conveyance of water, also the right to enter upon said lands and make necessary excavations for laying pipes and aqueducts, and to inspect, repair, replace, and control the same.

"And for and in consideration of the foregoing agreement, and as the purchase-price of the above-described premises, the party of the second part do covenant and agree to pay to the party of the first part, its successors, or assigns the sum of $10,155, United States gold coin, to be paid in the following manner :

[1] Only a portion of the contract is here given.—ED.

" $2539 on or before delivery of this contract,
3808 on or before April 8th, 1888,
3808 on or before April 8th, 1889,

and interest upon said respective sums from April 8th, 1887, until paid, at the rate of 8 per cent per annum, payable annually ; and if not so paid, at option of said company, to be added to principal and bear like interest.

" And the party of the second part, in consideration that the party of the first part does hereby agree that the party of the second part may at once enter upon, occupy, and enjoy the above-described premises, does further covenant and agree to pay and discharge all taxes, assessments, and water rates that may be levied or assessed during the pendency of this agreement, on the said described premises, and in default of the party of the second part doing so, the party of the first part may pay the same, and before the final payment of purchase-money the party of the second part hereby expressly agrees to refund all amounts so paid, with interest from the date of such payment at the rate of 1 per cent per month.

" And the party of the second part further agrees that during the pendency of this agreement he will not commit or suffer any strip or waste of said premises, or of any improvements now existing or hereafter to be placed thereon ; and if any default shall be made in any of the above payments for the space of sixty days after the same shall become due, then it shall be lawful for the party of the first part, its successors, or assigns, at their option, to rescind this agreement to convey, to re-enter upon, and to repossess said premises and all improvements existing thereon ; removing the party of the second part and all claiming under him therefrom, and it is agreed that in such case all payments theretofore made shall be retained by the party of the first part as compensation and liquidated damages for the previous use, enjoyment, and occupation of the premises by the party of the second part. And it is hereby expressly covenanted and agreed between the parties hereto that this instrument is not and shall not be construed as a conveyance, equitable or otherwise, and that until the delivery of said final deed of conveyance or tender of all payments precedent thereto the party of the second part, his heirs or assigns, shall have no title, equitable or otherwise, to said premises.

" It is further expressly agreed that time is of the essence of this contract.

" In witness whereof, the party of the first part has caused its corporate name and seal to be subscribed and affixed by its

president and secretary thereunto duly authorized; and the party of the second part has hereunto set his hand and seal this May 3d, 1887. Executed in duplicate.

"POMONA LAND AND WATER COMPANY,
"By H. A. PALMER, *President.*

"[Seal of the Company.]
"By F. L. PALMER, *Secretary.*
"H. M. LOUD. [L. S.]

"Sealed and delivered in the presence of
"B. F. NICHOLS."

The declaration, after alleging the refusal and failure of the defendant below to pay the respective sums due under the several contracts, averred that the plaintiff had been at all times, and was still ready and willing, upon the making of the payments in said contracts expressed to be made and performed by the said Henry M. Loud, to convey by deed of grant, bargain, and sale to the said Loud, his heirs or assigns, the property described in said contracts, together with the shares of stock of the respective irrigation companies referred to in the contracts. There was no averment in the declaration of any tender of a conveyance or conveyances of the lands or of the stock in the irrigation companies, nor of any tender of any conveyance or contracts referred to in the applications.

The record contains no plea on the part of the defendant below, but there was served upon the plaintiff's attorney a copy of the plea of the general issue, with notice of special matters of defence, which the parties have treated as a pleading by the defendant.[1]

As a further special defence the defendant set up "that the plaintiff did not, on the day when the last instalment of the purchase-price was made payable by the terms of said alleged contracts respectively, nor at any time, convey or tender a conveyance of the land or stock described in said contracts respectively, or in either or any of them to this defendant."

Upon the trial of the cause the Circuit Court directed a verdict for the plaintiff for the various sums due and unpaid under the contracts, amounting with interest to $79,819.30. On motion for a new trial, heard before the Circuit Justice (Brewer, J.), and the District Judge, who tried the case (Brown, J.), it was ordered that judgment be entered on the verdict, but that execution should be stayed "until thirty days after the plaintiff had deposited with the clerk of the Court for the benefit of the vendee all the deeds to the lands and certificates of stock, so

[1] The statement of the special matters of defence has been omitted.—ED.

that defendant may have an opportunity of examining the same to see if the titles are perfect, and the transfers of stock are made in accordance with the laws of the State of California."

In compliance with this order the plaintiff below deposited deeds for the land and certificates for the stock in the irrigation companies in accordance with the terms of the several contracts, but the defendant declined to accept the benefits of the order or to receive the deeds and stock so deposited, and prosecuted the present writ of error to reverse the judgment of the Court below.

George F. Edmunds and *Benton Hanchett* for plaintiff in error.

Don M. Dickinson and *Henry M. Duffield* for defendant in error.

Jackson, J., after stating the case, delivered the opinion of the Court.[1]

If the acts to be performed by the land company and the purchaser, respectively, are dependent and concurrent, neither party would be entitled to an action against the other without the averment of performance, or the tender of performance on his part. If, however, the payment of the purchase-price for the lands is a condition precedent to the land company's covenant to convey, then it is entitled to enforce payment without conveyance or tender of conveyance, and the allegation of its readiness and willingness to convey, upon payment of the purchase-money, was sufficient.

The question whether covenants are dependent or independent must be determined in each case upon the proper construction to be placed on the language employed by the parties to express their agreement. If the language is clear and unambiguous it must be taken according to its plain meaning as expressive of the intention of the parties, and under settled principles of judicial decision should not be controlled by the supposed inconvenience or hardship that may follow such construction. If parties think proper, they may agree that the right of one to maintain an action against another shall be conditional or dependent upon the plaintiff's performance of covenants entered into on his part. On the other hand, they may agree that the performance by one shall be a condition precedent to the performance by the other. The question in each case is, which intent is disclosed by the language employed in the contract?

In this case there is no ambiguity in the language of the contracts. The covenant and agreement of the land company is that "after the making of the payment and full performance of

[1] A portion of the opinion has been omitted.—Ed.

the covenants hereinafter to be made and performed by the party of the second part (Loud), the party of the first part (the land company) will, in consideration thereof, convey by deed of grant, bargain, and sale to the party of the second part, his heirs or assigns," the described lands, together with the designated shares in the irrigation companies. A subsequent clause of the contract provides that "this instrument is not and shall not be construed as a conveyance, equitable or otherwise, and until the delivery of the final deed of conveyance, or tender of all payments precedent thereto, the party of the second part, his heirs or assigns, shall have no title, equitable or otherwise, to said premises," and it is further provided that time is of the essence of the contract.

If these terms and provisions of the contracts are to be understood in their plain and obvious meaning, they clearly express the intention of the parties to be that the purchaser shall first pay the purchase-price of the lands contracted for before he is entitled to demand a conveyance therefor. It is also clear that the purchaser (the defendant below) could not have legally demanded from the land company a deed or conveyance for the lands until after the purchase money had been fully paid. The payment or tender of payment of the purchase-price for the land was a condition precedent to the right to the conveyance. The authorities, both in England and in this country, fully sustain this construction of the contract. A brief reference will be made to some of the principal cases on the subject

In the learned note of Williams to the early case of Pordage *v.* Cole, 1 Saund. 320*a*, it is said that "if a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen, or may happen before the thing which is the consideration of the money, or other act, is to be performed, an action may be brought for the money or for not doing such other act before performance; for it appears that the party relied upon his remedy, and did not intend to make performance a condition precedent; and so it is where no time is fixed for performance of that which is the consideration of the money or other act."

In Porter *v.* Shephard, 6 T. R. 665, involving the right of a lessee to terminate the lease, it was held that the words "from and after payment of rent and performance of covenants" constituted a condition precedent.

In the subsequent case of Grey *v.* Friar, 4 H. L. C. 565, where the opinion of the judges was asked by the House of Lords as to whether a proviso constituted a condition prece-

dent, the case of Porter *v.* Shephard was followed, and the proviso held to be a condition precedent.

In Goldsborough *v.* Orr, 8 Wheat. 217, it is said that where the acts are stipulated to be done at different times, the covenants are to be construed as independent of each other.

So in Goodwin *v.* Lynn, 4 Wash. C. C. 714, the rule was laid down that to ascertain whether covenants are dependent or independent, the intention of the parties is to be sought for rather in the order of time in which the acts are to be done, than from the structure of the instruments.

In Phillips' Constr. Co. *v.* Seymour, 91 U. S. 646, 650, it was said by Miller, J., speaking for the Court, that "where a specified thing is to be done by one party as the consideration of the thing to be done by the other, it is undeniably the general rule that the covenants are mutual, and are dependent, if they are to be performed at the same time; and if by the terms or the nature of the contract one is first to be performed as the condition of the obligation of the other, that which is first to be performed must be done, or tendered, before that party can sustain a suit against the other. There is no doubt that in this class of contracts, if a day is fixed for performance, the party whose duty it is to perform or tender performance first must do it on that day, or show his readiness and willingness to do it, or he cannot recover in an action at law for non-performance by the other party."

In many cases, both in England and in the United States, the rule of construction is adopted that an agreement to pay by instalments or at different times would make the covenants independent, since such an agreement manifests a willingness to rely on the covenants of the other contracting party for title or performance as the consideration for such payments. Also where the acts stipulated to be done are to be done at different times, the covenants are generally construed to be independent of each other.

But in the case at bar the terms of the contract contain no stipulation that the covenants of the respective parties are to be performed at the same time or concurrently. On the contrary, the clearly expressed intention was that the payment of the purchase-price of the lands should precede the performance of the land company's covenant to convey the lands and water stocks. The consideration to be paid covered both the lands and the stocks, and its payment was a condition precedent to a transfer of either or both. The provision that the stock was to be delivered by the land company and accepted by the purchaser (subject to the by-laws of the irrigation com-

panies), " when payment in full is made for the above-described land," in no way changes the proper construction of the contracts, or establishes that the stock was to be transferred concurrently with the payment for the lands. The expression " when payment in full is made for the above-described land," confirms the construction that the payment was a condition precedent to the conveyance of either stock or land or both. The purchaser had no right to a transfer of the stock before he became entitled to a conveyance of the land.

We cannot accede to the contention of the plaintiff in error that the contracts should be so construed as to make payment of the first instalment of purchase-money a condition precedent to the covenant to convey, but that the last instalment of purchase-money should be treated as dependent or concurrent with the covenant to convey. The covenants are to be interpreted as of the date of the execution of the contract, and as applying to each and all the instalments of purchase-money alike. Covenants like those in the case under consideration are not of a shifting character, independent at one time and dependent at another, or independent as to one or more instalments of purchase-money and dependent in respect to others, unless there is a clearly expressed intention on the part of the contracting parties that such should be the case. No such intention is either expressed or implied in the language of the contracts in suit. The payment of all the instalments of purchase-money is a condition precedent to the performance of the land company's covenant to convey.

Our conclusion is that there is no error in the judgment of the Court below, and it is accordingly affirmed.

RAE *v.* HACKETT.

IN THE EXCHEQUER, MAY 1, 1844.

[*Reported in* 12 *Meeson & Welsby* 723]

ASSUMPSIT on a charter-party. The declaration stated that, by articles of agreement made between the plaintiff and the defendant, owner of the ship Emma, it was agreed that the ship should sail and proceed in ballast to a safe and covenient port, near to Cape Town, and there load a full cargo of merchandise, and therewith proceed to Cork or Falmouth ; and the plaintiff agreed to load the said vessel with the said cargo, and to pay freight for the same to the defendant, etc. The

declaration then averred that although the plaintiff was ready and willing to appoint and put on board the ship a fit and proper person as supercargo, to take care of the merchandise to be loaded on board the said ship, to indicate and make known, and which supercargo would have indicated and made known, to the master of the ship, a safe and convenient port near Cape Town for receiving on board such cargo of merchandise, yet the defendant did not nor would suffer or permit the said ship to proceed in ballast on the said intended voyage, etc.

General demurrer and joinder.

The principal point stated for argument by the defendant was that the declaration was defective and bad in omitting to state, either that the plaintiff gave notice to the defendant of a safe and convenient port near Cape Town, to which the ship was to proceed, or anything equivalent in law to such notice.

Crowder in support of the demurrer.

Tomlinson, contra.

POLLOCK, C.B. I think this is a perfectly clear case. Calling to our assistance our knowledge of mercantile matters, it seems to me that the port to which the vessel was to proceed was to be selected by the charterer, and not by the owner. It is admitted that it is either to be named by him, or that he is to send somebody with the vessel to name it. But if it was to be the latter, there should have been a stipulation to that effect in the charter-party.

PARKE, B. My only doubt arose from the omission of the charter-party to state whether the option of selecting the port was to be with the charterer or the owner. But, looking at the whole of it, I think the port was to be selected by the plaintiff, the charterer; therefore it should either have been named before the ship sailed, or there should have been an express stipulation for its being named afterward. So if it was intended that a supercargo should go for that purpose, there should have been an express stipulation to that effect. In the absence of any such agreement the charterer is the party to select the port. The declaration, therefore, is bad for want of an averment that he selected a safe port, and gave notice thereof to the defendant.

ALDERSON, B. I am of the same opinion. It is clear that the charterer is the person to name the port, because he is to provide the cargo. How could he provide a cargo from all the places which the other party might choose to go to?

ROLFE, B., concurred.

Judgment for the defendant.

GLAHOLM *v.* HAYS.

IN THE COMMON PLEAS, HILARY TERM, 1841.

[*Reported in* 2 *Manning & Granger* 257.]

ASSUMPSIT upon a memorandum of charter of the Pomona, Smith master, whereby it was agreed that the ship, being tight, stanch, and strong, and every way fitted for the voyage, should, having liberty to load a cargo of coals out, either to Venice or Trieste, or both those ports, proceed to Trieste, and there load a complete and full cargo of wheat or other lawful merchandise, the merchants finding mats for dunnage if required, if the vessel should load coals on the ship's account; the cargo to be addressed to the charterer's agents, which the merchants bound themselves to ship, not exceeding what the said vessel could reasonably stow and carry over and above her tackle, apparel, provisions, and furniture; and that the said vessel, being so loaded, should therewith proceed to a good and safe port in the United Kingdom, calling at Cork or Falmouth for orders, or so near thereunto as she might safely get, and deliver the same, on being paid freight at and after the rate of 9*s.* per quarter for wheat, with 10 per cent thereon for primage, and other goods in fair proportion thereto, restraints of princes and rulers during the said voyage always excepted; that the cargo should be sent alongside and taken from alongside the said vessel at the expenses and risk of the said freighters; that the freight should be paid on unloading and right delivery of the cargo, one half in cash, and the remainder by approved bill at two months' date; that forty running days should be allowed the said merchants, if the ship were not sooner despatched, for loading the said ship at Trieste and unloading at her port of discharge, and twelve days on demurrage over and above the said laying days, at £6 per day; the vessel to sail from England on or before February 4th then next; that the vessel should be addressed to the charterer's agents at the ports of loading and discharge; that the cash for the ship's disbursements should be advanced free of interest or commission, and that the penalty for the non-performance of the said agreement should be £800. Mutual promises and general allegation of performance. Breach, that no agent or other person on behalf of the defendants, for the loading of the said vessel could be found by the said master, nor had any such agent or other person been appointed by the defendants; and, further, that the

defendants did not, nor would, within the number of days in the charter-party mentioned in that behalf, nor did nor would any other person or persons on the behalf of the defendants, within the said last-mentioned number of days, load the said vessel with a full and complete cargo of wheat or other lawful merchandise, according to the tenor and effect of the said charter-party, and of their promise and undertaking; but, on the contrary thereof, wholly neglected and refused to load the said vessel with any cargo or merchandise whatsoever; and the plaintiff further saith, that by reason of the premises, the said vessel was detained for a long space of time, to wit, for the space of twenty days after the said lay days and days of demurrage in the said charter-party mentioned, while the said master was endeavoring to procure another cargo; and that by reason of the said defendants not having been ready to load the said ship, and not having appointed or provided any agent or other person for the loading of the said vessel, the plaintiff was put to great charges and expenses, amounting, to wit, to the sum of £100, in and about inquiring and advertising for the said agents, and the plaintiff further saith, that by reason of the defendants not having provided any cargo or merchandise whatsoever as aforesaid, the plaintiff not only lost and was deprived of all the profit and advantage which he might and otherwise would have made by the freight and primage of the said cargo so agreed to be loaded by the defendants as aforesaid, amounting to a large sum of money, to wit, the sum of £2000; but was also put to great charges and expense, amounting to a large sum of money, to wit, the sum of £1000, in and about the master of the said vessel endeavoring to procure, and procuring, another freight in the stead of the said freight so agreed to be provided by the defendants as aforesaid; and the plaintiff further saith that by reason of the premises, and by reason of freights having fallen in value between the arrival of the said ship and the expiration of the said lay days, the freight so provided by the said master as aforesaid was of much less value, to wit, £450 less value than the freight so agreed to be provided by the defendants as aforesaid; and that by reason of the premises the plaintiff had been put to great expense, and sustained great loss and inconvenience.

The defendants pleaded, *inter alia*, that although the said vessel was required by the said charter-party to sail from England on or before February 4th next after the making of the said charter-party, yet the said vessel did not sail from England on or before the said February 4th; but on the contrary thereof, the said vessel remained and continued in England, without the

leave or license, and against the will of the defendants for a long time after the said February 4th, to wit, until and upon February 22d in the year aforesaid. Whereupon the defendants then refused to perform and fulfil the said charter-party, as they lawfully might do, for the cause aforesaid. Verification.

Replication that the said vessel, during the time she remained in England after the said February 4th, as in the last plea mentioned, was detained by contrary winds, and that the said vessel did not remain in England after the elapsing of the time during which the vessel was so detained as aforesaid ; and the plaintiff further saith that the expiration of the said time at which the said vessel set sail was before any refusal by the defendants to fulfil or perform the charter-party, and as soon after the said February 4th in the last plea mentioned as was practicable in that behalf ; and that the time which elapsed after the said February 4th, and before the sailing of the said vessel, as in the said last plea mentioned, did not hinder the said vessel from proceeding to and arriving at Trieste within a reasonable time in that behalf, but that the said vessel proceeded on her said voyage with such despatch as to arrive at Trieste within a reasonable time after the said February 4th as is in the declaration in that behalf mentioned, and before other vessels which had sailed from England before the said February 4th ; without this that the time which elapsed after February 4th, before the sailing of the said vessel from England, was a long and unreasonable time, in manner and form as in the last plea in that behalf alleged, concluding to the country.

Special demurrer, showing for cause, that inasmuch as the replication professes to contain a special traverse, the inducement thereof ought to have contained, and to have constituted, a sufficient answer, in substance, to the said last plea ; yet that in fact it contains and constitutes no such answer, inasmuch as the detention of the said vessel by contrary winds was not provided for or admitted by the said charter-party as an excuse for the non-performance of the said charter-party by the said plaintiff ; nor is it material to the merits of this suit, whether the said vessel arrived at Trieste within a reasonable time after such detention, or whether the said vessel arrived at Trieste before or after any other vessels which had sailed from England before the said February 4th ; and also that the said replication is further defective in this, that the conclusion thereof contains no direct or formal traverse or denial of any material allegation contained in the said last plea ; and also that the said replication is further defective in this, that the inducement thereof amounts to a pleading in confession and avoidance of the said

last plea, inasmuch as it admits the allegation contained in the said last plea, to wit, that the said vessel did not sail from England on or before the said February 4th, and attempts to avoid the same by affirming that the said ship was detained by contrary winds ; and also that the said replication is further defective in this, that it attempts to put in issue a matter wholly immaterial and irrelevant to the merits of the cause, inasmuch as the terms of the said charter-party in the said declaration mentioned provided absolutely that the said vessel should sail from England on or before the said February 4th next after the making thereof, and such sailing thereof was made a condition precedent to the performance of the said charter-party by the said defendants, for the fulfilment of which the said plaintiff bound himself absolutely, and made the same the essence of the contract with the said defendants ; and also that the said replication is further defective in this, that it does not in any manner traverse, or confess and avoid, any of the material allegations contained in the said last plea. And also that the said replication is uncertain, inasmuch as it does not appear thereby what it is intended to answer, or how it is applicable to the said last plea, or what connection the arrival of the said vessel at Trieste within a reasonable time after its detention by contrary winds, or its arrival at Trieste before other vessels, has with the merits of this cause, or with the due fulfilment of the said charter-party as made and set forth by the said plaintiff. And also that the said replication is further defective in this that it traverses, and attempts to put in issue, a matter not alleged in the plea which it professes to answer, inasmuch as it is not alleged in the said last plea that the time which elapsed after February 4th, before the sailing of the said vessel from England, was a long and unreasonable time, and the said replication by reason thereof contains no traverse of, and has no reference to the said plea.

Shee in support of the demurrer.

Bompas, contra.

TINDAL, C.J., now delivered the judgment of the Court.

The question raised upon this record is whether the clause contained in the charter-party set out in the declaration—viz., the vessel to sail from England on or before February 4th next" —is a condition precedent on the part of the ship-owner, upon the non-compliance wherewith on his part, the defendants, the freighters, were at liberty to throw up the charter. The defendants, in their plea, have treated the clause as importing a condition ; alleging in such plea that the vessel " did not sail from England on or before the said February 4th, but, on the

contrary, remained and continued in England, without the leave and against the will of the defendants for a long time after, whereupon the defendants refused to perform and fulfil the said charter-party as they lawfully might;" and the plaintiff, having demurred to this plea, the question on the legal construction of the charter-party is thereby raised.

Whether a particular clause in a charter-party shall be held to be a condition, upon the non-performance of which by the one party the other is at liberty to abandon the contract, and consider it at an end; or whether it amounts to an agreement only, the breach whereof is to be recompensed by an action for damages, must depend upon the intention of the parties to be collected, in each particular case, from the terms of the agreement itself, and from the subject-matter to which it relates.[1] "It cannot depend," as Lord Ellenborough observes, "on any formal arrangement of the words, but (must depend) on the reason and sense of the thing as it is to be collected from the whole contract." See Ritchie *v.* Anderson, 10 East, 295. And looking, in the first place, at the terms of this agreement, we think some distinction must have been intended by the contracting parties between this particular clause and those which precede and follow it, as to the nature of the obligations thereby respectively created. All the clauses of the charter-party, both prior and subsequent to the clause in dispute, are framed strictly and properly in the language of agreement only. The charter-party states, "it is mutually agreed between the parties that the ship being tight, etc., shall proceed to Trieste, and there load a complete cargo; that the said vessel being so loaded shall therewith proceed to a good and safe port in the United Kingdom; that the cargo shall be sent alongside; that the freight shall be paid in the manner therein stipulated; that forty running days shall be allowed the merchants." And then is interposed the clause now under discussion—viz., "the vessel to sail from England on or before February 4th next." After which the charter-party continues in the same frame as before, that the vessel shall be addressed to the charterers' agents, etc. Referring, therefore, in the first place, to the variation between the language of the particular clause, and that of the clauses among which it is found, there is reasonable ground for surmising that some distinction must have been intended between them; and no other distinction can exist except that the one set of clauses sounds in agreement, and the other clause in condition.

The very words themselves, "to sail on or before a given

[1] And see *ante*, vol. I., 851.

day," do, by common usage, import the same as the words "conditioned to sail," or "warranted to sail on or before such a day;" and, undoubtedly, if in the middle of a common bought and sold note, for a cargo of corn, or any other goods were found the words, "to be delivered on or before such a day," they would be held to amount to a condition; and the purchaser would not be bound to accept the cargo, if not ready for delivery by the day appointed.

And looking at the subject-matter of the contract, without regarding the precise words, we think that construing the words as a condition precedent, will carry into effect the intention of the parties, with more certainty than holding them to be matter of contract only, and merely the ground of an action for damages.

Both parties were aware that the whole success of a mercantile adventure does, in ordinary cases, depend upon the commencement of the voyage by a given time. The nature of the commodity to be imported, the state of the foreign and home market at the time the contract of charter-party is made, and the various other calculations which enter into commercial speculations, all combine to show that despatch and certainty are of the very first importance to their success; and certainly nothing will so effectually insure both despatch and certainty as the knowledge that the obligation of the contract itself shall be made to depend upon the actual performance of the stipulation which relates to them.

The present case appears to us to be distinguishable from those cited on the part of the plaintiff, in both the particulars to which we have adverted—viz., that in this case the form of the stipulation is more nearly in the language of condition than in that of agreement, while in the cases cited the stipulation is in the language of covenant only; and, again, that in this case the performance of the stipulation goes more to the very root and the whole consideration of the contract. And, indeed, in most or all of those cases the objection has not been taken until after the voyage had been performed, nor, in many cases, until after the goods had been accepted, so that it is manifest the breach of the agreement of which the defendant complained, and which he sought to set up as the non-performance of a condition precedent, could not go to the whole of the consideration of the contract.

Such was the case of Constable *v.* Cloberie,[1] where the shipowner covenanted that his ship should sail with the first fair wind; the case of Bornmann *v.* Tooke, 1 Campb. 377, where

[1] Palmer, 397; Noy, 75; Abbott, L. S. 191; *ante*, 18.

the covenant was, that the ship should sail with the first favorable wind ; and the defence in each was set up against a demand for the freight, after the ship had performed her voyage and the merchant had accepted the cargo, so likewise in Davidson *v.* Gwynne, 12 East, 381, the covenant to sail with the first convoy was held not to be a condition precedent, the voyage being in fact performed, and so of the rest.

Upon the whole, therefore, we think the intention of the parties to this contract sufficiently appears to have been to insure the ship's sailing at latest by February 4th, and that the only mode of effecting this is by holding the clause in question to form a condition precedent, which we consider it to have been.

Judgment for the defendant.

RAYMOND *v.* MINTON.

In the Exchequer, May 3, 1866.

[*Reported in Law Reports*, 1 *Exchequer* 244.]

Declaration on a covenant by the defendant, contained in an indenture of apprenticeship of February 18th, 1864, by which the defendant covenanted to teach H. Page, the plaintiff's son-in law, in the art, trade, or business of a builder, ornamental painter, and decorator, and to find him food, etc., during the five years of his apprenticeship, for a premium of £29, averring that the defendant did not nor would, during the term, or the part of it already elapsed, teach the apprentice in the said art, etc., but wholly failed, neglected, and refused so to do ; and did not nor would find him food, etc.

Third plea, as to the alleged breach in not teaching the apprentice, that at the time of the said alleged breach the apprentice would not be taught, and by his own wilful acts hindered and prevented the defendant teaching him in the said art, etc., and then by his said acts caused the breach pleaded to.

Demurrer and joinder.

Goddard in support of the demurrer.

Grantham in support of the plea.

Pollock, C.B. It is evident that the master cannot be liable for not teaching the apprentice if the apprentice will not be taught, and the plea sufficiently shows that to be the case.

Martin, B. The master contracts to teach the apprentice by the best means in his power, and common sense points out

that, if the apprentice will not be taught, the master cannot teach him by any means. The willingness of the apprentice to learn is naturally a condition precedent to the master's teaching him. Reduce the matter to a particular instance, and this becomes apparent. The master says to the apprentice, "Get up on that ladder, and I will teach you the business of a house decorator;" the apprentice refuses, and stands upon the floor. It is obvious that the cause of the apprentice not being taught is that he has made it impossible, and the master cannot be called upon to perform an impossibility.[1]

Bramwell and Pigott, BB., concurred.

Judgment for the defendant.

R. S. Taylor for plaintiff.

W. T. Ricketts for defendant.

JULIUS ROBERTS, Plaintiff in Error, *v.* JOHN W. BRETT, Defendant in Error.

In the House of Lords, March 16, 1865.

[*Reported in* 11 *House of Lords Cases* 337.]

This was an action for damages for breach of a contract under seal entered into on May 15th, 1855. The defendant represented The Mediterranean Submarine Electric Telegraph Company, and on its behalf entered into a contract with the plaintiff to lay down 150 miles of cable between Cape Tabaque, on the northern coast of Africa, and Cape Spartivento, in the island of Sardinia.

The declaration stated that by a certain indenture, etc., entered into on May 15th, 1855, the plaintiff, for the considerations therein mentioned, covenanted with the defendant "that he, the plaintiff, should and would forthwith, at his own expense, procure the Cornwall frigate, or some other suitable vessel, and stow or cause to be stowed on board the said vessel the submarine telegraphic cable, which was 150 miles in length, and was then at Morden Wharf, Greenwich, etc., and also should and would, at the like expense, fit out, etc., the said vessel, and provide competent officers and crew, and place on board sufficient breaks and rollers, etc., and would, to the extent of £600, pay the expense of insuring the cable, and several other things; and should and would "have the ship fully equipped in all respects and ready for sea at the Nore on or

[1] See Ellen *v.* Topp; 6 Ex. 424; 20 L. J. (Ex.) 241.

before July 15th then next." There were several other acts which the plaintiff undertook to do. And if he made default in having the ship with the cable on board fully equipped and ready for sea before July 15th then next, the defendant should be at liberty to retain from any moneys payable by him, as and for liquidated damages £200 per week, and at that rate for any less period than a week ; but the power to enforce this payment by way of liquidated damages "should be without prejudice to the right of the defendant to exercise any other powers or remedies at law or in equity, by virtue of these presents, or the bond thereinafter referred to for enforcing the completion of the works before covenanted to be done, or for compensating himself for the damage occasioned by such default." And the defendant covenanted with the plaintiff that "he, subject to such rights of deduction, would pay the plaintiff £5000 by the instalments and at the times next mentioned—that is to say, the sum of £1000, part thereof, on or before the expiration of seven days after the arrival of the vessel alongside Morden Wharf," the sum of £2000 twenty-one days after such arrival, and £2000 when the ship should put to sea from the Nore ; and at the expiration of twenty-one days from the time when the cable should have been laid down, the defendant covenanted to deliver to the plaintiff 500 paid-up shares in the company of £10 each. And then "it was agreed and declared that for the true performance of the covenants by the plaintiff thereinbefore contained, and for securing any penalties which he might incur under these presents, the plaintiff and two responsible sureties should, within ten days after the execution of these presents, give and execute to the defendant, his executors, etc., a bond in the penal sum of £5000. And for the due performance of the covenants on the part of the defendant thereinbefore contained, the defendant and two responsibile sureties should, within ten days from the execution of these presents, give and execute to the plaintiff, his executors, etc., a bond in the penal sum of £5000." And it was agreed and declared that the said bonds so to be given as aforesaid should not in any manner prejudice or affect the respective rights or liabilities of the plaintiff or the defendant.

The declaration then averred that the plaintiff did procure a vessel and fit it out, and was ready and willing to provide the officers and crew, and to perform all the acts covenanted to be performed, and to have the ship ready for sea at the Nore before July 15th ; but before the time arrived for so doing, the defendant refused to perform the contract, and dispensed with the vessel being brought alongside the wharf ; and the plaintiff

alleged that he had performed all conditions stipulated on his part, and that everything had taken place to entitle him to a performance by the defendant, of all which premises the defendant had notice, and was requested to stow the cable on board, etc., and for doing all which matters and things a reasonable time had elapsed before the commencement of this suit, yet that the defendant did not nor would stow, or allow to be stowed, the cable, etc., but wholly refused, etc., and stowed the cable on board another ship or vessel, and thereby broke his contract. And the plaintiff further assigned for breach that the defendant did not, within ten days, etc., execute the bond,[1] but therein made default.

The defendant pleaded first, except as to the giving of the bond (an exception repeated in each of the other pleas but the fifth), that the plaintiff did not procure a suitable ship, etc., and place the same alongside Morden Wharf as alleged. Secondly, that he did not fit out the ship as alleged. Thirdly, that the plaintiff was not ready and willing to provide and pay the officers and crew as alleged ; and, fourthly, that the plaintiff did not within ten days from the execution of the indenture (such ten days expiring before the plaintiff placed the ship alongside the Morden Wharf), or at any time give and execute, nor within the ten days procure two responsible sureties to give and execute, etc., a bond in the penal sum of £5000 for the true performance by the plaintiff of the other covenants in the indenture contained, and according to the meaning and effect of such indenture. Fifthly, as to the breach of covenant by the defendant, so excepted as aforesaid, the defendant paid into Court the sum of 1*s*.

The plaintiff took issue on the first, second, third, and fifth pleas.[2] On these pleas issue was joined. On these issues of fact the cause was tried in June, 1858, at Guildhall, and a verdict for £2300 was found (on all the issues) for the plaintiff.

The plaintiff demurred to the fourth plea, and the defendant joined in demurrer. On this demurrer judgment was given for the defendant (18 C.B. 561), which judgment was affirmed in the Exchequer Chamber. This proceeding in error was then brought.

Bovill and *Massy Dawson* (*Beasley* was with them) for the plaintiff in error.

Mellish and *Horace Lloyd* for the defendant in error.

[1] This was a new breach, added after the first argument on the demurrer. See 6 C. B. N. S. 611, 618.

[2] The original pleadings were amended, see 6 C. B. N. S. 611, 618 ; they are here stated as they appeared when the case was brought up to this House.

LORD CHANCELLOR (LORD WESTBURY). My Lords, the question on this appeal is whether, having regard to the true construction and intent of the agreement of May 15th, 1855, the stipulation that the appellant should, within ten days after the date and execution of the agreement, give a bond with sureties for the due performance of the covenants on his part, was a condition, the previous fulfilment of which, unless waived or released, was necessary to enable the appellant to maintain any action upon the agreement.

The case has been learnedly argued at the bar, and many decisions were cited, but the question depends on simple principles. First, having regard to the subject-matter of the agreement between the appellant and the respondent, the latter the representative of a company, it is reasonable to suppose that the company which was about to intrust the appellant with the laying down of a very valuable telegraphic cable, should require from the appellant security for the due fulfilment of his contract, and the requisition that the bond should be given within ten days is sufficient to show that it was intended to precede any material act under the agreement. The appellant indeed contends that if he had brought the Cornwall frigate or some other suitable vessel alongside Morden Wharf on the day of the date of the agreement, or the next day, the sum of £1000 would have been payable to him by the respondent within a week afterward; and thus he insists that a material part of the contract might have been performed before the expiration of the ten days allowed for the bond, and that therefore the giving of the bond is not a condition precedent.

I cannot think that any such great expedition, if it had been possible, was contemplated by the parties, or that the appellant was bound to act with any such rapidity. His engagement is that he will forthwith, at his own expense, procure the Cornwall frigate or some other suitable ship or vessel for the purpose required; the word "forthwith" does not necessarily imply that this was to be done by the appellant before he had received the bond of the respondent and his sureties—that is, before the expiration of ten days. But if the appellant had brought a suitable vessel alongside the wharf so expeditiously as to have entitled himself to the sum of £1000, and had received that sum (which must be the hypothesis) within the ten days and before the time for giving his bond expired, I should not have thought that it affected his liability to give the bond within the appointed time.

It is urged that in the state of things supposed, the £1000 might not have been paid as stipulated, and so a breach of

covenant by the respondent might have occurred within the ten days. If it did, I should still be of opinion that the appellant was bound to give or tender his bond to the respondent within the prescribed time. The right to have the security of two responsible sureties for the performance of the appellant's covenant was a very material thing to the respondent's company, and of the essence of the contract; and I do not think it could be effected by anything voluntarily done by the appellant within the ten days.

It was also contended by the appellant that the covenants to give the bonds by the appellant and respondent respectively were mutual covenants dependent one on the other; and that there was no default by the appellant until that instant of time at which there was a like default by the respondent, and that the respondent, being in like default, could not defend himself by pleading the default of the appellant.

But I fear that this is not the true meaning and effect of the contract. The engagements to give the bonds are not entered into in consideration one of the other; but the fulfilment of his own engagement by each of the parties, is a necessary preliminary to his right to recover on the agreement. It is the true intent and object of the agreement, that each party should find security within the time prescribed. If this be not done by either party both may be in effect released from the contract, which may fall to the ground; but neither party can recover for breach of the covenants in the agreement, unless he has performed this precedent obligation. I therefore move your Lordships that the judgment of the Court below be affirmed.

Lord Cranworth. My Lords, I think that the judgment of the House ought to be for the defendant in error.

I agree with the opinions of the learned judges, that the giving of the bond must have been intended to be a condition precedent to any right of action for breach of any of the covenants contained in the indenture. On any other hypothesis the bond would be useless.

No doubt as there was a covenant by each party with the other, to give a bond with sureties within ten days, if default was made in giving a bond, a right of action would accrue for breach of that covenant, but such an action could produce no fruit to the party recovering in it. If brought before breach of any of the other covenants it could only result in nominal damages. If brought after a breach no damages could be recovered, except such as would have been recoverable in an action founded on the breach itself. It would give no right

against any sureties, the obtaining of which right was the sole object of the bond.

It was argued that the circumstance that the bonds were to be given not immediately, but within ten days, was inconsistent with the hypothesis of a condition precedent. A breach, it was suggested, might occur within the ten days, and so a right of action might accrue before any bond need have been given. This does not appear to me inconsistent with the hypothesis of a condition precedent. Probably the parties knew that, practically, no breach could occur within the ten days. But even if that is not so, the party injured by a breach of covenant within ten days might by giving his bond put himself in a condition to sue for the breach, for it would certainly be no answer on the part of the defendant sued for the breach to say that he had not given his bond.

Suppose, for instance, that the plaintiff had on the day of the date of the indenture moored a proper ship alongside Morden Wharf, but that after the expiration of seven days the defendant refused to pay him the £1000. The plaintiff, if he had given a proper bond with sureties to the defendant, would then have been in a condition to maintain an action of breach of covenant against the defendant, whether he had or had not given a proper bond to the plaintiff.

But it was argued that, even assuming the giving of the bonds to be conditions precedent, still they must be treated as mutual and dependent conditions, and that the defendant, who had given no bond to the plaintiff, could not insist on the want of such a bond from him. I do not feel the force of this argument. There is nothing in the indenture making it obligatory on either party to apply to the other for his bond. By giving the required bond, the party giving it puts himself in a condition of enforcing, if he thought fit, the performance of the covenants. If neither party, as was the case here, gave any bond, neither party could sue for any breach of covenant. This was the opinion of the Courts below, and in that view of the case I concur.

LORD CHELMSFORD. My Lords, I agree with the decision of the Court of Exchequer Chamber affirming the judgment of the Court of Common Pleas.

The question is whether the fourth plea is an answer to the action, or, in other words, whether the giving the bond by the plaintiff was a condition precedent to his right to recover damages from the defendant for his non-fulfilment of his part of the agreement.

The parts of the deed necessary to be noticed are these. [His Lordship stated them, see *ante*, 338.]

The learned counsel for the plaintiff argued that the covenant on the part of the plaintiff to give the bond could not be intended to be a condition precedent, because he was forthwith bound to procure the ship or vessel, so that he was to do an act before the ten days had expired within which the bond was to be given ; and also that the defendant, having covenanted to pay the plaintiff £1000 on or before the expiration of seven days after the arrival of the ship or vessel at Morden Wharf, and the money being appointed to be paid on a day which might happen before the expiration of the ten days within which the bond was to be given, the giving of the bond could not be a condition precedent, according to the first rule upon the subject of dependent and independent covenants laid down in the notes to Pordage *v.* Cole.[1] They also contended that the case fell within the third rule stated in these notes, as it was a covenant going only to part of the consideration, the breach of which might be paid for in damages. These rules are not proposed for the purpose of absolutely determining the dependence or independence of covenants in all cases, but merely as furnishing a guide to the discovery of the intention of the parties. For, as Lord Kenyon said in Porter *v.* Shephard,[2] " conditions are to be construed to be either precedent or subsequent according to the fair intention of the parties, to be collected from the instrument ; and technical words (if there be any to encounter such intention) should give way to that intention."

Now what may fairly be considered to have been the intention of the parties upon the whole scope and object of the deed in question ? Putting the argument into a short form, it amounts to this : The defendant says to the plaintiff, in consideration of your doing certain acts, and giving me a bond with sureties to secure the performance of your covenant to do these acts, I will pay you a sum of £5000, and give you a bond with sureties to secure the payment. And the plaintiff, on the other hand, covenants to do the acts and to give the bond in consideration of the performance by the defendant of the covenants on his part to be performed.

Upon this short summary of the deed there could scarcely be a doubt that either party might refuse to perform his part of the agreement until he was secured by the bond of the other.

But the counsel for the plaintiff say that the particular terms of the deed show that this could not be the intention. In particular, they lay great stress on the word " forthwith" in the

[1] Wms. Saund. 320. [2] 6 T. R. 668.

plaintiff's covenant to procure the vessel, which they interpreted to mean "immediately;" and they urged this as a proof that the giving the bonds could not be meant to be conditions precedent, because this act of the plaintiff must necessarily have been done before the expiration of the ten days, to the last moment of which the defendant was at liberty to delay the execution of the bond. And they also insisted upon the clause for payment by the defendant of £1000 before the expiration of seven days after the arrival of the vessel at Morden Wharf, which might have happened within the ten days; and therefore they argued that the case, in both these respects, was within the first rule in the notes to Pordage *v.* Cole.

It appears to me that too great force was attributed to the word "forthwith" in the agreement, and that all that was meant by it was, that the plaintiff was, without delay or loss of time, to procure a suitable vessel for receiving the telegraphic cable. And to quicken his diligence the defendant covenanted to pay him £1000 within seven days after the arrival of the vessel at Morden Wharf. Out of regard to his own interest, too, the plaintiff would use all expedition in commencing the performance of the agreement, because unless he had the vessel with the cable on "board equipped and ready for sea by July 15th," he would have been liable to pay £200 per week for his default. I think that the plaintiff could not have been compelled to take a single step, nor to incur the smallest expense toward procuring the vessel, till he was secured by having the defendant's bond, and that if he chose to proceed without having this security, everything he did was at his own peril. If the defendant wished to obtain a right to urge the plaintiff's progress within the ten days, he might have executed and delivered his bond, and then he would have performed all that was required of him till the first instalment of the £5000 became due.

It is a strong circumstance indicative of the intention of the parties, that the stipulations with respect to the mutual bonds should be conditions precedent, that these stipulations follow all the covenants entered into on both sides, and that they are agreed and declared to be given "for the true performance of the covenants hereinbefore contained. They are obviously intended, therefore, to be mutual securities for the performance of all the covenants by each of the parties respectively. This, I think, takes away all ground for saying that the covenants for giving the bonds go only to part of the consideration, and that a breach of them may be paid for in damages. Though, strictly speaking, they enter into and form part of the consideration on

both sides, yet they extend to the whole of the covenants contained in the deed, and are an essential and vital part of the agreement between the parties. Nor is it easy to see how a breach of them could be compensated in damages, or what estimate could be formed of the measure of damages for their non-fulfilment.

I do not think that anything in favor of the plaintiff can be made of the circumstance of the defendant not having given his bond. It appears to me that the mutual default of the parties had the effect of virtually putting an end to the agreement, because neither of them was in a situation to insist upon performance by the other.

A supposed case was put at the bar, of the plaintiff, after the ten days had expired without his bond having been given, going on to perform his covenants, and afterward, in an action to recover the amount stipulated to be paid by the defendant, being met by a plea of the non-performance of the condition precedent. I have no difficulty in saying that in such a case the party who may avail himself of the non-performance of a condition precedent, but who allows the other side to go on and perform the subsequent stipulations, has waived his right to insist upon the unperformed condition precedent as an answer to the action.

Looking at the whole of the deed, I am satisfied that it was the intention of the parties that each should receive from the other a bond as a security for the performance of the covenants before either was bound to proceed to perform any of the stipulations contained in the deed. For these reasons, I think the judgment of the Exchequer Chamber ought to be affirmed.

Judgment affirmed.

ARMITAGE *v.* INSOLE AND ANOTHER.

IN THE QUEEN'S BENCH, FEBRUARY 5, 1850.

[*Reported in* 14 *Queen's Bench* 728.]

ASSUMPSIT on an agreement, whereby plaintiff agreed to conduct the sale and disposal of the defendants' coals, to carry out their instructions, promote their interests, and extend their connection, to the utmost of his ability and power, throughout Ireland, for three years from January 1st then next, and for that purpose to visit certain places in Ireland at stated times in each year; and defendants agreed to engage the services of the plaintiff, as above described, for three years, and to pay him

the yearly sum of £120—viz., £60 every July 1st and January 1st from the date thereof. And defendants further agreed to give yearly free to the plaintiff during the said three years 20 tons of coals, to be put free on board ship at Cardiff for the use of the plaintiff, in lieu of all charges for stationery and so forth.

The declaration, after alleging mutual promises, and performance by the plaintiff of the conditions precedent on his part, as far as was necessary to support the breaches for discharging him from his employment by the defendants under the contract, and for their refusing to pay him the salary agreed on, assigned a further breach as follows : Nor did nor would the defendants give to the plaintiff yearly, or at any time during the said period of three years, 20 tons of coals, or any coals whatever free on board ship at Cardiff for the use of the plaintiff ; but, on the contrary thereof, they, the defendants, wholly neglected and refused so to do, and have not at any time delivered or given to the plaintiff at Cardiff or elsewhere any coals whatever ; and there is now due and owing from the defendants to the plaintiff under the said agreement a large quantity (viz.) 60 tons of coals, the same being of great value (viz.) £24.

Demurrer. Joinder.

Mellish for the defendants.

A. I. Johnston, *contra*.

PATTESON, J. The contract clearly shows a duty cast on the plaintiff to name the ship at some time or other ; but it is argued, not until the defendants have given notice of their readiness to supply the coals, because no time is fixed for the delivery. If "yearly" mean at the end of the year, then the time is fixed, and the plaintiff should have named the ship at that time. Perhaps that is the meaning of the contract. But if otherwise, and if the defendants could call upon the plaintiff at any time during the year to accept the coals upon reasonable notice (for notice must be reasonable), even then the plaintiff must have named the ship, and should have averred that he was ready and willing to accept the coals, and that he had a ship ready to receive them.

COLERIDGE, J. I am of the same opinion. Where circumstances, left uncertain by the contract, are of such a nature that one party cannot perform his part of the contract until they are fixed, the other party, insisting on the contract, ought to fix those particulars. Here both time and place should have been fixed by the plaintiff ; but certainly place.

WIGHTMAN, J. The main difficulty arises from the uncertainty of the time when the coals are to be put on board. I should say, the agreement being silent as to time, that it must

be at the option of the plaintiff. But, however that may be, the defendants clearly cannot give the coals free on board until they know the ship and at what port it is to discharge. Whatever, therefore, the construction of the agreement may be as to time, the plaintiff must fail for want of averring that he was ready and willing to name a ship.

Judgment for defendants.

VYSE *v.* WAKEFIELD.

In the Exchequer, Easter Term, 1840.

[*Reported in* 6 *Meeson & Welsby* 442.]

Covenant on an indenture, dated March 3d, 1827, whereby the defendant, in consideration of £3100, bargained, sold, and assigned to the plaintiff certain dividends, interest, and annual produce, from time to time due and payable, or to arise from and after the decease of one Eliza Robson, during the natural life of the defendant, if he should survive her; to have, hold, receive, and take the dividends, etc., thereby assigned unto the plaintiff, his executors, etc., from and after the decease of the said Eliza Robson, for and during the natural life of the defendant, if he should survive her; and the defendant did thereby for himself, his heirs, etc., covenant, promise, and agree with and to the plaintiff, his executors, administrators, and assigns, among other things, that he, the defendant, should and would at any time or times thereafter, at the request of the plaintiff, his executors, administrators, or assigns, appear at an office or offices for the insurance of lives within London, or the bills of mortality, or before the agent or agents of any such office or offices in the county where he, the defendant, might happen to be resident or actually to be; and then and there truly answer such questions as should or might be asked or required touching or concerning his age and state of health, and do all other necessary acts in order to enable the plaintiff, his executors, administrators, or assigns, if he or they should think proper, to insure the life of him, the defendant; and should not afterward do, or, as far as with him should lie, permit to be done, any act, deed, or thing whatsoever whereby any such insurance might be avoided or prejudiced; as by the said indenture, reference being thereunto had, will, among other things, appear. And the plaintiff says that he, the defendant, in part performance of his said covenant, did afterward, to wit, on March 8th,

1827, at the request of the plaintiffs, appear at an office for the insurance of lives within London—that is to say, the office of a certain company of persons or office established for the purpose, and carrying on the trade or business of and for the insurance of lives under the name of, and called and known by the name of the Rock Life Assurance Company—and did then and there answer certain questions then asked and required of him, touching and concerning his age and state of health, and did then do all other necessary acts, in order to enable the plaintiff to insure the life of him, the defendant, in and with the said company or office, he, the plaintiff, then thinking proper and intending to insure the life of him, the defendant, in and with the said company or office, according to the course and practice of the said company or office ; the answering such questions as aforesaid, and the said other matters in that behalf aforesaid being necessary and proper, according to the course and practice of the said company or office, to enable the plaintiff to insure the life of the defendant thereupon and therewith, and being reasonable in that behalf, of all which the defendant then had notice. And the plaintiff further says, that he, the plaintiff, did thereupon, and within a reasonable time then next following, to wit, on the day and year last aforesaid, according to the course and practice of the said company or office, insure the life of the defendant in and with the said company or office by a certain policy or insurance, at and for the premium of £81 17*s.* 6*d.*, payable annually in that behalf, in order to and whereby the plaintiff then became and was entitled, if such premiums should be so paid, to be paid and satisfied out of the funds and property of the said company, according to the provisions of the company's deed of settlement, within three calendar months after satisfactory proof should have been received at the office of the said company of the death of the defendant, the sum of £3000, and such further sum or sums as might, under the regulations of the said company, be appropriated as a bonus to that policy, subject to and under the condition or proviso, among others, that in case the defendant should go beyond the limits of Europe, the same should be null and void, and the plaintiff says that the said condition or proviso, at the time of making the said indenture, and from thence hitherto, was and is usual and reasonable ; and that although he, the plaintiff, has performed and observed everything in the said indenture on his part to be performed and observed, yet the defendant has broken his covenant made with the plaintiff as aforesaid in this, to wit, that he, the defendant, after the making thereof, and after the making of the said policy or insurance as aforesaid, and after he, the

plaintiff, had paid to the said Rock Life Assurance Company divers, to wit, twelve annual premiums as aforesaid, payable in respect of the said policy or insurance as aforesaid, and after the sum that, under the regulations of the said company, would have been appropriated as a bonus to that policy, in case of the death of the defendant had amounted to a large sum, to wit, £2000, and had become of great value to the plaintiff, to wit, the value of £2000, and after the said policy had become and was of great value to the plaintiff, to wit, of the value of £3000, to wit, on June 1st, 1838, he, the defendant, went beyond the limits of Europe, to wit, to the province of Canada, in North America, whereby and by reason of the premises, the said policy became and was null and void, etc.

Special demurrer, assigning for cause, that the declaration does not contain any specific averment that the defendant, before he went beyond the limits of Europe, as in the declaration alleged, had received or had any notice from the plaintiff, or otherwise that the defendant had by any means been made or become aware of the fact, that the plaintiff had insured the life of the defendant, as in the declaration alleged, or that such insurance was subject to or under the condition or proviso in the declaration alleged; whereas the defendant could not be liable for going beyond the limits of Europe, unless he knew at the time that the policy had been effected, and that it was subject to the condition or proviso stated in the declaration.

Peacock in support of the demurrer was stopped by the Court, who called upon

Cowling to support the declaration.

Lord Abinger, C.B. I am of opinion that the defendant in this case is entitled to our judgment on two grounds. The plaintiff having reserved to himself the liberty of effecting the insurance at any office within the bills of mortality, the number of which is limited only by the circumscription of the place, and having also reserved to himself the choice of time for effecting the insurance, it appears to me that he ought to give the defendant notice of his having exercised his option, and of the insurance having been effected before an action can be maintained. But there is also another ground which weighs strongly with me in coming to this conclusion. Even supposing the defendant were bound to go to all the insurance offices within the bills of mortality to ascertain whether such a policy had been effected, he would still be obliged to do something more —namely, to learn what were the particular conditions on which it was effected; because the covenant here is not that the defendant shall not do anything to evade the covenants or condi-

tions usually prescribed by insurance offices, but that he shall not violate any of the conditions by which such insurance might be avoided or prejudiced—that is, he is bound to observe all the stipulations contained in any policy which the plaintiff may effect. Now some conditions totally distinct from the conditions in general use might be annexed by a particular insurance office, and in such case it would be most unfair to allow the plaintiff to keep the policy in his pocket, and without notice of them to call on the defendant to pay for a violation of the stipulations contained in it. Suppose one of the conditions imposed by the policy were that the party whose life was insured should live on a particular diet, or at a particular place, or cease from some particular practice to which he was addicted, or that he should abandon some course of exercise which might, if persevered in, cost him his life, and the forsaking of which the insurance office might be fully justified in making a condition of insuring the life at all, it would be hard if the plaintiff could, without giving the defendant notice of the existence of such a condition, make him pay the amount of the policy on its violation. The rule to be collected from the cases seems to be this, that where a party stipulates to do a certain thing in a certain specific event which may become known to him, or with which he can make himself acquainted, he is not entitled to any notice, unless he stipulates for it ; but when it is to do a thing which lies within the peculiar knowledge of the opposite party, then notice ought to be given him. That is the common sense of the matter, and is what is laid down in all the cases on the subject ; and if there are any to be found which deviate from this principle, it is quite time that they should be overruled.

PARKE, B. My mind is not entirely free from doubt, but I am inclined on the whole to agree with the Lord Chief Baron. The defendant here is sued on a covenant by which he stipulates to do two things—namely, to appear at an office for the insurance of lives, within London or the bills of mortality, in order to enable the plaintiff to effect an insurance on his life ; and, after it is effected, to perform the conditions which may be contained in it. And it does not appear that this is confined to an insurance to be effected at the particular office at which he should appear, the words " such insurance" in this covenant meaning simply an insurance on his life. The defendant is bound in the first instance to appear at an insurance office, and when the insurance is effected, he is then bound, as far as in him lies, to fulfil the stipulations which have been entered into by the policy. The question then is, whether an action can be

maintained on this covenant, when notice of the effecting such insurance or of its terms is not averred in the declaration. The general rule is that a party is not entitled to notice unless he has stipulated for it, but there are certain cases where, from the very nature of the transaction, the law requires notice to be given, though not expressly stipulated for. There are two classes of cases on this subject, neither of which, however, altogether resembles the present. One of them is, where a party contracts to do something, but the act on which the right to demand payment is to arise is perfectly indefinite, as in the case of Haule *v.* Hemyng,[1] where a man promised to pay for certain weys of barley as much as he sold them for to any other man ; there the plaintiff is bound to aver notice, because the person to whom the weys are to be sold is perfectly indefinite, and altogether at the option of the plaintiff, who may sell them to whom he pleases ; and in such cases the right of the defendant to a notice before he can be called on to pay is implied by law from the construction of the contract. So where a party stipulates to account before such auditors as the obligee shall assign, the obligee is bound to give him notice when he has assigned them, for that is a fact which depends entirely on the option or choice of the plaintiff. On the other hand, no notice is requisite when a specific act is to be done by a third party named, or even by the obligee himself ; as, for example, where the defendant covenants to pay money on the marriage of the obligee with B., or perhaps on the marriage of B. alone (for there are some cases to that effect), or to pay such a sum to a certain person or at such a rate as A. shall pay to B. In these cases there is a particular individual specified, and no option is to be exercised ; and the party who, without stipulating for notice, has entered into the obligation to do those acts is bound to do them. But there is an intermediate class of cases between these two. Let us suppose the defendant in this case bound to perform such stipulations as shall be contained on a policy to be effected at some office in London. Now my present impression is that where any option at all remains to be exercised on the part of the plaintiff, notice of his having determined that option ought to be given, and if this had been a covenant by the defendant to perform the conditions to be imposed by any insurance company then existing in London, I think it would be the duty of the plaintiff to notify to the defendant the exercise of his option as to which he had selected. But this principle holds even more strongly in the present case, for not only do the terms of the covenant apply to all actually

[1] Viner's Abr. Condition (A. d.), pl. 15 ; Cro. Jac. 422.

existing companies of the sort, but to all that might at any future time, subsequent to the date of the deed, be established within the bills of mortality. Now that is a condition which appears to me so perfectly indefinite, that notice ought to be given by the plaintiff of his having determined his choice ; and I think, therefore, that he was at least bound to give notice that a policy of insurance had been effected by him at such a particular office ; it might then, perhaps, be the duty of the defendant to inquire at that office into the nature and terms of the policy which had been there effected. If, therefore, the more extended construction of this covenant is to be adopted, and the defendant's contract understood to extend to all existing and future companies, no doubt at all can exist upon the point. Supposing, however, that the covenant is to be construed in a limited sense, as restrained to any office where the party should have appeared to answer the questions relative to his health, etc., as the words "such insurance" seem, and perhaps with truth, to indicate, even then the option of the plaintiff is of such an indefinite nature, that the defendant cannot be called on to account for the non-observance of it, unless notice be given to him. Now here none has been given ; there is, it is true, notice of an intention to effect a policy, but none either of its having been made at all or made with any particular conditions. Possibly if it had been notified generally to the defendant that an insurance had been effected at a particular office, it would become his duty then to inquire into its nature and the conditions with which it was coupled ; but I think that he was at least entitled to notice of the fact of its existence.

Judgment for the defendant.[1]

ASHLEY HAYDEN *v.* WILLIAM BRADLEY.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, SEPTEMBER TERM, 1856.

[*Reported in* 6 *Gray* 425.]

ACTION OF CONTRACT to recover damages for the defendant's failure to keep in repair the buildings included in a lease from the defendant to the plaintiff of a hotel and farm in Southwick, by which the defendant covenanted to "put the buildings and fences on, around, and about the premises in a good condition,

[1] The concurring opinions of Barons Alderson and Rolfe have been omitted.—ED.

and so to maintain them for and during the term of " the lease, and the plaintiff covenanted " that the lessor may enter to view and make improvements, and to expel the lessee, if he shall fail to pay the rent, or make or suffer any strip or waste thereof."

At the trial in the Court of Common Pleas, the defendant, who resided in Springfield, contended that he was not liable, under his covenant, for damages arising from want of repair, after the plaintiff had entered into the occupation of the premises under the lease, and before notice to the defendant of such want of repair. But Mellen, C.J., instructed the jury, that " for defects in the buildings, occurring after the commencement of the lease, the plaintiff was entitled to recover damages for such want of repair from the time such defects occurred ; it being the duty of the defendant, under this lease, to take notice of such defects or want of repair, and prevent damage to the plaintiff, by repairing the same, without notice from the plaintiff." The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

H. Vose for the defendant.

W. G. Bates for the plaintiff.

METCALF, J. The established rule of law, which the court are now to apply, is rightly stated by Lord Abinger in Vyse *v.* Wakefield, 6 M. & W. 452, 453. It is this : " Where a party stipulates to do a certain thing in a certain specific event which may become known to him, or with which he can make himself acquainted, he is not entitled to any notice, unless he stipulates for it ; but when it is to do a thing which lies within the peculiar knowledge of the opposite party, then notice ought to be given him." The case at bar comes within the first branch of this rule. The defendant stipulated to maintain the buildings in good condition during the term for which he demised them to the plaintiff, on the happening of a specific event, to wit, that they should not be in good condition, but should need repairs. He might have known, or made himself acquainted with the fact, that they needed repairs. And he did not stipulate for notice. See Smith *v.* Goffe, 2 Ld. Raym. 1126, and 11 Mod. 48 ; 1 Saund. Pl. & Ev. (2d ed.) 214 ; System of Pleading, 126, 127 ; Lawes Pl. in Assump. (Amer. ed.) 176 *et seq.*

But if the defendant's agreement to maintain the buildings in good condition were not, of itself, sufficient to decide the question raised in this case, yet there is another clause in the lease which is decisive, namely, the reservation, by the defendant, of a right of entry upon the premises, " to view and make improvements." He, therefore, having provided for himself the

means of ascertaining the contingency upon which he was to make repairs, was not entitled to notice from the plaintiff that the contingency had happened. Keys *v.* Powell, 2 A. K. Marsh. 254.

Exceptions overruled.

MAKIN *v.* WATKINSON.

IN THE EXCHEQUER, NOVEMBER 22, 1876.

[*Reported in Law Reports* 6 *Exchequer* 25.]

DECLARATION upon a covenant contained in a lease of a mill and other buildings with machinery and fixtures, by which the lessors (of whom the defendant was one) covenanted with the plaintiff (the lessee) that they would at all times during the demise, at their own expense, maintain and keep the main walls, main timbers, and roofs of the said buildings in good and substantial repair, order, and condition; alleging performance of conditions precedent, and a default in repairing whereby, etc.

Plea: That the plaintiff gave no notice to the lessors of any want of repair in the main walls, main timbers, and roofs, nor that the same were not in good and substantial order and condition.

Demurrer and joinder.

Wills was called upon to support the plea.

Kemplay in support of the demurrer.

CHANNELL, B. I am of opinion that this is a good plea. The declaration is good, because it avers the performance of conditions precedent, which would include a request if a request is necessary. The question is, whether the plea denying the giving of notice is a good defence. I agree that the case of Moore *v.* Clark[1] is not an authority; because, although what was said there upon this point was said by two very eminent judges, one of them (Gibbs, J.) peculiarly conversant with pleading, and was illustrative of the matter under discussion, yet it was not necessary to the determination of the case. We must, therefore, look at the question apart from direct authority and upon general principles. And, looking at it in this way, Vyse *v.* Wakefield[2] is, to some extent, an authority, for it warrants the proposition that, when a covenant would, according to the letter, be an unreasonable one, words not inconsistent with the words used may be interpolated to give it a reasonable construction. This proceeds on the assumption

[1] 5 Taunt. at p. 96.

[2] 6 M. & W. 442.

that the contracting parties were reasonable men, and intended what was reasonable. If, however, the language of the covenant is clearly inconsistent with the words sought to be added, I agree that, however absurd the covenant may be, it cannot be varied.

Now here repairs are to be done to the exterior of the premises as to which it is just possible that the lessor might, by observation, acquire a knowledge of their necessity. But the main timbers of the building, which must be within its carcase, and the roofs are to be kept in repair; and of the repairs required for these he could have no knowledge without notice. He could not enter to see the condition of those parts, even though, independently of his obligation under the covenant, it might be of great consequence to him to be acquainted with it. Here, therefore, by the rule of common sense, which is supported by the case of Vyse *v.* Wakefield,[1] we ought to import into the covenant the condition that he shall have notice of the want of repair before he can be called on under the covenant to make it good.

Bramwell, B. I am also of opinion that the plea is good. To hold it to be so we must hold the defendant's covenant to be a covenant to repair on notice. I have the strongest objection to interpolate words into a contract, and think we ought never to do so unless there is some cogent and almost irresistible reason for it arising from the absurdity of the contract if it is read without them. Does such a reason, then, exist here? I think it does. I think that we are irresistibly driven to say that the parties cannot have intended so preposterous a covenant as that the defendant should keep in repair that of which he has no means of ascertaining the condition. The lessee is in possession; he can say to the lessor: "You shall not come on the premises without lawful cause;" and to come for the purpose of looking into the state of the premises would not be a lawful cause. If the lessor comes to repair when no repair is needed he will be a trespasser; if he does not come, he will, according to the plaintiff's contention, be liable to an action on the covenant if repair is needed, and will be liable, not only to the cost of repair, but to consequential damage for injury to chattels caused by want of the repairs he had no opportunity of effecting. This is so preposterous that we ought to hold that the parties intended the covenant to be read with the qualification suggested.

As to the authorities, we have, in the first place, an *obiter dictum* of two eminent judges, which was appropriate to the

[1] 6 M. & W. 442.

matter in hand, and is, therefore, of great value, though not binding. The authorities on analogous cases, collected in Comyn's Digest, are by no means clear ; some seem one way, some another, and one, which occurs under the title Condition, L. 9, is very much in favor of the plaintiff. The case there referred to is Fletcher *v.* Pynsett, where, it appears, the defendant covenanted with the plaintiff that, if he would marry the defendant's daughter, the defendant would assure to him a certain copyhold ; and it was held that the plaintiff was entitled to sue without giving notice of the marriage. It seems to be suggested that, when the engagement is conditional upon the doing of an act by a third person, notice must be taken from that person. But this cannot be the reason of the rule, for, in a case put under L. 8 of the title I have referred to, it is said that a promise to pay as much for goods as any other pays requires a notice of how much another pays. But there seems no reason why the obligee should be less bound to give notice, or the obligor more bound to take notice of the act of a stranger than of the act of the obligee himself, as in some of the cases put in L. 9, where it is said notice is not necessary.

If we look to the reason of the rule, it is, that when a thing is in the knowledge of the plaintiff, but cannot be in the knowledge of the defendant, but the defendant can only guess or speculate about the matter, then notice is necessary.

To have inserted a provision in the covenant requiring notice would certainly have been very reasonable. When it is a question of putting it into the covenant by implication, one must needs, as in all such cases, have great doubt ; but upon the whole, looking to the authorities, and bearing in mind what is said in Moore *v.* Clark,[1] I think we are warranted in so reading the covenant.

Judgment for the defendant.[2]

RUDOLPH WEHRLI *v.* HENRY REHWOLDT.

IN THE SUPREME COURT OF ILLINOIS, JUNE 16, 1883.

[*Reported in* 107 *Illinois* 60.]

APPEAL from the Appellate Court for the First District ; heard in that Court on appeal from the Superior Court of Cook County ; the Hon. Sidney Smith, J., presiding.

Pfirshing for the appellant.

Tagert and Cutting for the appellee.

[1] 5 Taunt. at p. 96.

[2] The concurring opinion of Martin, B., has been omitted.—ED.

MULKEY, J., delivered the opinion of the Court.

This action was brought by Henry Rehwoldt, the appellee, in the Superior Court of Cook County, against Rudolph Wehrli, the appellant, to recover damages for the breach of the following written contract :

" This agreement, made this 9th day of March, 1880, between Rudolph Wehrli and Henry Rehwoldt, witnesseth : That for and in consideration of the mutual covenants and agreements between said parties hereinafter named and specified, the parties hereto have settled and discharged all matters of difference existing between them, of every nature and kind whatsoever.

" Wehrli, in pursuance and consideration of the foregoing, agrees to pay to Rehwoldt $100 at execution of this agreement —the receipt of which is hereby acknowledged by Rehwoldt. Wehrli further agrees to employ Rehwoldt to superintend the erection of a block of buildings, to be built on a lot in Chicago, according to plans drawn by F. Bauman, said buildings to be commenced on or before January 1st, 188[illegible], and completed as soon as can be without unnecessary delay ; and Wehrli agrees to pay Rehwoldt, for his services as superintendent, $475, in instalments, as work progresses, and all to be paid on or before the time when the buildings are completed. Rehwoldt, in consideration of the foregoing, agrees to superintend the erection of said buildings for the sum above named, at the time and manner above specified, and to give all necessary time, attention, and ability to the superintending of the erection of said buildings, as superintending architect."

The action is special *assumpsit*, the declaration being in the usual form. It avers a readiness and offer to perform the contract by the plaintiff, during the period specified therein, and then charges that the " defendant erected said buildings during said time, and did not allow plaintiff to superintend the construction of the same, and refused to permit plaintiff to perform his part of said contract."

It appears from the testimony of both parties, that the plaintiff never performed, or offered to perform, any service under this contract, and although frequent conversations occurred between them just before the commencement of the work, and while bids were actually being received for the work, not a word was said by either of the parties in relation to the superintendence of the work by the plaintiff. The evidence also clearly shows the work was let out to contractors, and this was well known to plaintiff, for, as just observed, or according to his own testimony, he was present, perhaps as often as twice, when the defendant was receiving bids on the work. The defendant

in his testimony says : "I saw Rehwoldt during spring of 1886, while I was opening or taking bids for the erection of that block of buildings on Vincennes Avenue. Rehwoldt was present when I was opening bids. He knew I was going on with the work. Rehwoldt never offered his services to do the work. He never did any work about the buildings, and never offered to do any. I never prevented him from doing any work about the buildings. I saw him frequently during the time that I was opening bids, and getting ready to go on with the work, and saw him while the work was progressing. I employed some one else afterward to do the work. I employed Mr. Bauman, and paid Bauman for doing the work. Mr. Rehwoldt did not, at any time, either before I commenced building or while it was going on, offer his services to superintend the erection of buildings, or to do any work about them." It also appears, from appellee's own testimony, that he was living in Chicago, and knew when the contractor commenced the erection of the block of buildings in question.

Under the instructions of the Court the jury found for the plaintiff, and assessed his damages at $350. The Court rendered judgment on the verdict, and the defendant excepted. On appeal to the Appellate Court this judgment was affirmed, and the defendant brings the case here for review, upon a certificate from the Appellate Court.

On the trial the defendant asked the Court to instruct the jury as follows :

"The jury are instructed by the Court that if they find, from the evidence, that the plaintiff knew when and where defendant was going to erect the block of buildings mentioned in the contract in this case, and that defendant did not prevent plaintiff from superintending the erection of said buildings, and that plaintiff did not, in fact, do any work or perform any services for defendant under said contract, then the jury should find for the defendant."

Which the Court refused to do, but, on the contrary, told the jury, at the instance of the plaintiff, "that under the contract it was the duty of the defendant to notify the plaintiff when he was ready to go on with the work, and the plaintiff was under no obligation to offer his services till he was notified" —to which several rulings of the Court the defendant at the time excepted.

The only question arising upon the record, which we are permitted to consider, is, whether, under the evidence, the instructions in question properly laid down the law of the case to the jury, and we are clearly of opinion they did not. The error in

instructing the jury is doubtless attributable to a misapplication of a general principle applicable to a specific class of cases, analogous in some respects to the case in hand, but differing from it in an important particular. The undoubted general rule is, that in suing upon an executory contract for services, the plaintiff, before he will be entitled to recover, must aver, and prove, if denied, that he has either performed the services, or that he was ready and offered to perform them. Gould's Pleading, ch. 4, §§ 13, 15; Chitty's Pleading (14th Amer. ed.), 321, *et seq.* But where it is expressly stipulated, or where, from the nature of the contract itself, the plaintiff is entitled to notice or a request to perform, then it is sufficient to aver, and prove, if denied, a readiness to perform.

The law on this subject is well and aptly stated by Parsons in his work on Contracts, Vol. II., p. 669. The author says: "The rule to be collected from the cases seems to be this, that where a party stipulates to do a certain thing in a certain specific event, which may become known to him, or with which he can make himself acquainted, he is not entitled to any notice unless he stipulates for it; but when it is to do a certain thing which lies within the peculiar knowledge of the opposite party, then notice ought to be given him. That is the common sense of the matter, and is laid down in all the cases on the subject." The Courts below must have assumed the case in hand fell within the specific class of cases referred to by the author in the last part of the paragraph just cited, which we think was clearly a misapprehension.

The work was to be done at a specified place, and within a definite time. It was also let out to contractors, as was doubtless contemplated by both parties at the time of making the contract, and the plaintiff had express notice that it was so let out, for, as we have already seen, he was present, talking with the defendant, when some of the bids were received. When the work passed into the hands of the contractors, it is hardly probable that either the plaintiff or the defendant knew the exact day on which they would commence operations. As to the defendant, he, so far as we can see, had no special interest in knowing, while the plaintiff's duty required him to know, and which he could easily have ascertained by inquiry, if he had seen proper to do so. When the work commenced it was his duty to be there. Instead of that, he quietly sat by, wilfully closing his eyes to the fact, and waiting for the plaintiff to make a formal request that he should go to work. The law, as we understand it, did not require the defendant to do this. The plaintiff having failed to make an appearance, the defend-

ant, some time after its commencement, employed another architect, under whose supervision the work proceeded to completion, when he was fully paid by the defendant for the services which the plaintiff himself should have performed. During all the time, from the date of the contract to the hour of the completion of the work under another architect, the plaintiff, according to his own statement, so far from offering to do the work, never so much as said a word about it to the defendant, although he had repeated conversations with him about the time the work was let to the contractors—nor, indeed, was there anything said by the defendant on the subject. These facts, we think, tend strongly to show a mutual abandonment of the contract by both parties.

This somewhat extensive discussion of the facts is not done with the view of questioning the finding of the jury. So far as the hearing here is concerned, with respect to controverted issues of fact raised in the courts below, either by the proofs or pleadings, it is wholly immaterial what the evidence on the trial was, for all such controverted issues of fact are conclusively settled against the appellant by the affirmance of the judgment in the Appellate Court; but our discussion of the facts was for the sole purpose of showing, as clearly as we could, the instructions given, which would have been entirely proper in a certain class of cases, were not proper under the circumstances of this case.

The judgment of the Appellate Court is reversed, and the cause remanded for further proceedings in conformity with the views here expressed.

Judgment reversed.

BIRKS *v.* TRIPPET.

IN THE KING'S BENCH, MICHAELMAS TERM, 1666.

[*Reported in* 1 *Saunders* 32.]

ASSUMPSIT. The plaintiff declares, that there were divers differences between the plaintiff and defendant; and for the determining thereof, they submitted themselves to the award of one Barker, an arbitrator, indifferently chosen between them to arbitrate, ordain, and finally adjudge of and upon the premises; and that the defendant, in consideration of the submission, and in consideration that the plaintiff had promised the said defendant to pay him £40 whensoever he should be

requested, if the plaintiff should not perform the award to be made on his part, undertook and promised the plaintiff that if the defendant should not perform the award to be made on his part, then the said defendant would well and faithfully pay £40 to the said plaintiff, when he should be thereunto requested. The plaintiff avers that the arbitrator made his award, and thereby awarded that the defendant should pay to the plaintiff 10*s.* in consideration of damages in an action of battery, and 20*s.* more for curing a horse, and 10*s.* more for curing an ox, and £4 more for the plaintiff's expenses in law, and that upon payment of the said sums amounting to £6 they should give to each other general releases, and that the defendant should deliver a fine to the plaintiff. And the plaintiff avers that the defendant had not paid the £6 nor delivered the fine according to the award; yet the said defendant not regarding his promise, but intending to defraud the plaintiff of the said £40, had not paid the said £40 to the plaintiff according to his promise, nor contented him for the same, and so concludes the action to his damage, etc., without alleging any demand of the £40. The defendant pleads in bar, that the plaintiff was indebted to him being an attorney in £4 for fees and expenses, and before the making of the award he gave notice thereof to the arbitrator, and offered to make it appear to him, and prayed he would allow it in his award; but the arbitrator made his award without any allowance or consideration had of the said £4, notwithstanding such notice and proof. And this, etc. Wherefore, etc. Upon which the plaintiff demurred in law.

And it was argued by *Lindsey*, of counsel with the plaintiff, that the plea was bad, because the submission was not conditional with an *ita quod*, etc.; for if it had been so, perhaps the arbitrator could not make his award of part of the differences, if he had notice of more, as Baspole's case, 8 Co. 98; Cro. Jac. 355; Dyer, 216, 242. But it appears by some of the said books, that if the submission be not conditional, then the arbitrators may make their award of parcel, although they have notice of more, and the award shall be good for such parcel. But he said, that admitting the submission had been conditional with an *ita quod*, yet this is a good award, for he had awarded general releases from both parties; and although the defendant had notified his debt to the arbitrator, yet the arbitrator was not bound to allow it, for perhaps he did not deem it to be a just debt, and therefore did not allow it; and the arbitrator was the judge of it; and here he has given his judgment that the plaintiff should be released by the defendant; and so he

has made his award thereof, and of all other differences whatsoever. And of such opinion was the Court.

Saunders, of counsel with the defendant, said that he would not maintain the plea. But he took an objection to the declaration, that the plaintiff in his declaration had not laid any request of the penalty of £40. For the declaration is, that the defendant promised to pay £40 upon request, if he did not perform the award ; and the request is material ; for he took a difference between a mere duty and a collateral sum. For where a mere duty is promised to be paid upon request ; as if in consideration of all moneys lent to the defendant, he promised to pay them again upon request, no actual request is necessary, but the bringing of the action is a sufficient request ; but otherwise it is upon a promise to pay a collateral sum upon request ; for there an actual request ought to be made before the action brought. Cro. Jac. 183 ; Selman *v.* King, 523 ; Hill *v.* Wade, 639 ; Waters *v.* Bridges. Now here the promise of payment of the £40 upon request is collateral, and is a penalty, and not a precedent duty, and, therefore, there ought to have been a request before the action brought. And so was the opinion of the whole Court. And Twysden, J., interrupted Saunders, and said to him, what makes you labor so ? The Court is of your opinion, and the matter clear. And thereupon judgment was given for the defendant, that the plaintiff should take nothing by his bill.

WALLIS *v.* SCOTT.

In the King's Bench, 1718.

[*Reported in* 1 *Strange* 88.]

The plaintiff declares, that the defendant, in consideration the plaintiff would make him a set of sails worth £45, promised to pay so much for them upon request ; and avers that he made the said sails ; and the defendant, although often requested, refuses to pay. Demurrer *inde*. And Branthwayte *pro defendente* argued, that this being a special contract, the plaintiff must show a performance of all on his part, which he has not done ; for he has not averred that he made the sails worth £45, and if they were not worth it, the defendant is not chargeable.

Secondly, the action being founded upon the breach of contract, there ought to be a special request laid. For this differs from the cases where there is a precedent debt or duty whereon

to ground the promise, for there I admit the action is a request. 2 Cro. 183. The defendant, in consideration the plaintiff being an innkeeper would entertain the defendant's commissioners, promised to pay for their lodging and diet upon request; and there being nothing but the general *licet sæpius requisit*, judgment was arrested upon that distinction, between a collateral contract for a thing *in fieri*, and a precedent debt or duty. And to the same purpose is 2 Cro. 523. In 2 Saund. 32. *Assumpsit* on mutual promises to perform an award, or pay each other £40 upon request, and in an action for the £40 the declaration was held ill, because no request was alleged, and the former cases and differences were agreed. Here is no money to be paid till two things are done, neither of which appear, 1, the making the sails of such a value, and 2, a request to pay for them.

Yorke contra. In actions upon the case the plaintiff may lay it as he can prove it, and is not obliged to a general *indebitatus assumpsit*. The value is part of the description of the sails, and, therefore, when we aver we made the aforesaid sails, *velaturas prædictas*, that takes in the whole description. As to the request, the *licet sæpius requisit* is sufficient. But if not, yet the want of a special request ought to have been shown for cause of demurrer. The cases in Croke can never be law, for they are after a verdict, when the Court will intend a request proved, and so is Pop. 160.

Branthwayte replied. It is admitted that the value ought to be averred, and the only question now is, whether it be or not.

Prædict will not be a sufficient averment. In Yelv. 36. Trespass for taking goods *a personâ* of the plaintiff, and judgment arrested for the insufficiency of averring the property. These cases as to the request being after a verdict, the argument holds *a fortiori* in this case, which is on a demurrer. The general request, as alleged, may be since the action brought, and this at most is but an executory promise.

Powys, J. (*absentibus Parker et Pratt*), thought the *prædictas velaturas* was sufficient. *Et per* Eyre, J. I do not think the value need be alleged; but if it need, yet the *prædict* takes it in, for if the value be part of the description, then it is averred that the plaintiff made such a set of sails as was agreed upon; that is, a set of sails which answers every part of the description.

Where notice or a request are by law necessary, there the general averment will not be sufficient; but it must be particularly set forth, that the Court may judge whether the notice or request were sufficient. But in this case I take it no request

was necessary, for on making the sails the money immediately becomes due. If I promise a tailor, that in consideration he will make me a suit of clothes, I will pay him so much, there needs no request, for as soon as he has done his part, there is a duty vested in him. And this differs from the cases where the payment is to be to a third person, or where an award directs a request.

Afterward, the Court being full, Branthwayte mentioned Cro. Eliz. 773 ; 91 Hutt. 107. And Yorke quoted Yel. 66, 121 ; 3 Bulst. 258 ; 2 Cro. 639. And the former cases of 2 Cro. 183, 523 were denied *per* Eyre, J., and judgment given for the plaintiff.

THEOPHILUS BROWN *v.* NATHANIEL H. FOSTER.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, SEPTEMBER TERM, 1873.

[*Reported in* 113 *Massachusetts Reports* 136.]

CONTRACT to recover the price of a suit of clothes.

At the trial in the Central District Court of Worcester, the defendant contended, and there was evidence tending to show, that the clothes were to be made and delivered to the defendant in North Brookfield, on or before a specified day, and that they were to be made to the satisfaction of the defendant.

It was agreed that the clothes were delivered on the evening of the day specified, which was Saturday, and that on the following Monday the defendant returned them to the plaintiff by the same person who delivered them, with written notice that the clothes did not fit, were unsatisfactory, and were not accepted.

The defendant offered evidence that the clothes did not fit him, and that they were not made in the manner and form agreed upon. While the defendant was testifying, the plaintiff produced the clothes in Court, and requested the defendant to try them on in the presence of the jury. The defendant assented, and, having put them on, wore them in the presence of the Court and jury. The plaintiff then called several tailors as experts, who testified that the clothes needed some alterations before they could be called a good fit, but that such alterations could be easily made without injury to them. He also offered evidence that he wrote a letter to the defendant the

same day the clothes were returned, in which the following language was used : " Can't you come and let us see what the trouble with the fit of your clothes is? From what you say about the coat we think we could remedy that, and we could make another vest if necessary, and coat too." To this letter the defendant replied that the clothes were unsatisfactory to him as they were, and that he would not accept them after they had been worked over and botched up, and refused to allow the plaintiff to make a new suit, or to accept any alterations to the suit already made.

There was evidence that the defendant came to the plaintiff's store soon after the clothes were returned, and the plaintiff asked him to try them on to see what alterations, if any, were necessary to make them fit ; this the defendant refused to do.

There was also evidence to show that a custom existed among tailors of having garments tried on after they were finished, and then making any alterations which might be necessary to make them fit.

The defendant asked the Court to give the following instructions to the jury :

" 1. If you find that the plaintiff agreed to make the clothes in question to the satisfaction of the defendant and failed so to do, then the plaintiff cannot maintain this action, and you will return a verdict for the defendant.

" 2. If you find that the plaintiff agreed to deliver the clothes on or before a specified time, made up in the manner and form agreed upon, and failed so to do, then the defendant was under no obligation to accept them, and you will return a verdict in his favor."

The Court refused to give the instructions in the form prayed for, but after giving instructions upon the other points raised, to which no objections were made, instructed the jury as follows :

" The plaintiff was bound to make the clothes of the material ordered, in a workmanlike manner, and to deliver them at the time agreed upon by the parties. If the plaintiff agreed to make the clothes to the satisfaction of the defendant, he was bound to do so, with these qualifications : if, when the clothes were delivered, there were defects in the fit of them, such as are liable to occur in first-class tailoring establishments, but such as could be easily remedied, and a custom among tailors has been proved to remedy such defects when they occur, the plaintiff was entitled to a reasonable opportunity therefor, and if he was willing and offered to remedy said defects, and the defendant refused to allow him to do so, the plaintiff is entitled to recover if the other facts in the case are proved."

The jury returned a verdict for the plaintiff, and the defendant excepted.

B. W. Potter & G. H. Ball for the defendant.

A. Thayer for the plaintiff.

DEVENS, J. There was evidence at the trial to show that the contract between the parties was an express contract, and by the terms of it the plaintiff agreed to make and deliver to the defendant upon a day certain a suit of clothes, which were to be made to the satisfaction of the defendant. The clothes were made and delivered upon the day specified, but were not to the satisfaction of the defendant, who declined to accept, and promptly returned the same. If the plaintiff saw fit to do work upon articles for the defendant and to furnish materials therefor, contracting that the articles when manufactured should be satisfactory to the defendant, he can recover only upon the contract as it was made ; and even if the articles furnished by him were such that the other party ought to have been satisfied with them, it was yet in the power of the other to reject them as unsatisfactory. It is not for any one else to decide whether a refusal to accept is or is not reasonable, when the contract permits the defendant to decide himself whether the articles furnished are to his satisfaction. Although the compensation of the plaintiff for valuable service and materials may thus be dependent upon the caprice of another who unreasonably refuses to accept the articles manufactured, yet he cannot be relieved from the contract into which he has voluntarily entered. McCarren *v.* McNulty, 7 Gray, 139.

When an express contract like that shown in the present case was proved to have been made between parties, it was not competent to control it by evidence of a usage. It may be that the very object of the express contract was to avoid the effect of such usage, and no evidence of usage can be admitted to contradict the terms of a contract, or control its legal interpretation and effect. Dickinson *v.* Gay, 7 Allen, 29, 31. The evidence admitted was of this description.

Exceptions sustained.

THE DUPLEX SAFETY BOILER COMPANY, RESPONDENT, *v.* C. HENRY GARDEN ET AL., APPELLANTS.

IN THE COURT OF APPEALS OF NEW YORK, FEBRUARY 9, 1886.

[*Reported in* 101 *New York Reports* 387.]

APPEAL from judgment of the General Term of the Supreme Court in the Second Judicial Department, entered upon an order made February 12th, 1884, which affirmed a judgment in favor of plaintiff, entered upon a verdict.

This action was upon a contract, the nature of which, and the material facts are stated in the opinion.

John A. Deady for appellants. Whether defendants were satisfied that the boilers as repaired were a success or not was, under the contract, for defendants alone to decide, and it was incumbent upon plaintiff to show they were so satisfied. McCarren *v.* McNulty, 7 Gray, 139; Brown *v.* Foster, 113 Mass. 136; Taylor *v.* Ames, 6 Lans. 280; Gray *v.* Cent. R. R. Co. of N. J. 11 Hun, 70; Huggans *v.* Fryer, 1 Lans. 276; Chadwick *v.* Lamb, 29 Barb. 518; Rich *v.* Milk, 29 Barb. 516; Hall *v.* Simpson, 19 How. Pr. 481; Farrell *v.* Hildreth, 38 Barb. 178.

H. C. Place for respondent.

DANFORTH, J. The plaintiff sued to recover $700, the agreed price, as it alleged, for materials furnished and work done for the defendants at their request. The defence set up was that the work was done under a written contract for the alteration of certain boilers, and to be paid for only when the defendants "were satisfied that the boilers as changed were a success." Upon the trial it appeared that the agreement between the parties was contained in letters, by the first of which the defendants said to plaintiff: "You may alter our boilers, changing all the old sections for your new pattern; changing our fire front, raising both boilers enough to give ample fire space; you doing all disconnecting and connecting, also all necessary mason work, and turning boilers over to us ready to steam up. Work to be done by 10th of May next. For above changes we are to pay you $700, as soon as we are satisfied that the boilers as changed are a success, and will not leak under a pressure of one hundred pounds of steam."

The plaintiff answered, "accepting the proposition," and as the evidence tended to show, and as the jury found, completed the required work in all particulars by May 10th, 1881, at which

time the defendants began and thereafter continued the use of the boilers.

The contention on the part of the appellants is that the plaintiff was entitled to no compensation, unless the defendants "were satisfied that the boilers as repaired were a success, and that this question was for the defendants alone to determine," thus making their obligation depend upon the mental condition of the defendants, which they alone could disclose. Performance must, of course, accord with the terms of the contract, but if the defendants are at liberty to determine for themselves when they are satisfied, there would be no obligation, and consequently no agreement which could be enforced. It cannot be presumed that the plaintiff entered upon its work with this understanding, nor that the defendants supposed they were to be the sole judge in their own cause. On the contrary, not only does the law presume that for services rendered, remuneration shall be paid, but here the parties have so agreed. The amount and manner of compensation are fixed; time of payment is alone uncertain. The boilers were changed. Were they, as changed, satisfactory to the defendants? In Folliard v. Wallace, 2 Johns. 395, W. covenanted that in case the title to a lot of land conveyed to him by F. should prove good and sufficient in law against all other claims, he would pay to F. $150, three months after he should be "well satisfied" that the title was undisputed. Upon suit brought, the defendant set up that he was "not satisfied," and the plea was held bad, the Court saying, "a simple allegation of dissatisfaction, without some good reason assigned for it, might be a mere pretext and cannot be regarded." This decision was followed in City of Brooklyn v. Brooklyn City R. R. Co., 47 N. Y. 475, and Miesell v. Globe Mut. L. Ins. Co., 76 N. Y. 115.

In the case before us the work required was specified, and was completed; the defendants made it available and continued to use the boilers without objection or complaint. If there was full performance on the plaintiff's part, nothing more could be required, and the time for payment had arrived; for according to the doctrine of the above cases, "that which the law will say a contracting party ought in reason to be satisfied with, that the law will say he is satisfied with."

Another rule has prevailed, where the object of a contract was to gratify taste, serve personal convenience, or satisfy individual preference. In either of these cases the person for whom the article is made, or the work done, may properly determine for himself—if the other party so agrees—whether it shall be accepted. Such instances are cited by the appellants.

One who makes a suit of clothes (Brown *v.* Foster, 113 Mass. 136), or undertakes to fill a particular place as agent (Tyler *v.* Ames, 6 Lans. 280), mould a bust (Zaleski *v.* Clark, 44 Conn. 218), or paint a portrait (Gibson *v.* Cranage, 39 Mich. 49; Hoffman *v.* Gallaher, 6 Daly, 42), may not unreasonably be expected to be bound by the opinion of his employer, honestly entertained. A different case is before us, and in regard to it, no error has been shown.

The judgment appealed from should be affirmed.

All concur.

Judgment affirmed.

MILNER *v.* FIELD.

In the Exchequer, November 25, 1850.

[*Reported in* 5 *Exchequer Reports* 829.]

Assumpsit for goods sold and delivered, work and labor, and materials, etc. Pleas: *non-assumpsit*, payment, and set-off. Issues thereon.

At the trial, before Pollock, C.B., at the last Surrey Assizes, it appeared that the plaintiff sought to recover for work done under a written agreement, whereby the plaintiff agreed to build for the defendant thirty houses, for the sum of £3130, to be paid by instalment as the works progressed. There were penalties for the non-performance of the works at certain stipulated periods; and also a proviso, that none of the instalments should be payable, unless the plaintiff should deliver to the defendant a certificate, signed by the surveyor for the time being of the defendant, that the works had been in all respects well and substantially performed, according to the specifications and plans. Some of the instalments had been paid, and the action was brought to recover the balance. No certificate was obtained; but the plaintiff's counsel tendered evidence to show that the defendant had appointed his own father as his surveyor, and that although the works were in all respects properly done, the certificate was withheld fraudulently and by collusion with the defendant. It was objected, on the part of the defendant, that this evidence was inadmissible; and the learned judge, being of that opinion, nonsuited the plaintiff, reserving leave for the plaintiff to take the opinion of the Court upon the point; and if they should think the evidence admissible, the cause was to be referred.

Lush in the present Term, November 11th, moved accord-

ingly, and submitted, that the want of a certificate could not be taken advantage of under the general issue ; but that the proviso should have been pleaded specially ; or, at all events, the plaintiff ought to have been allowed to give evidence of fraud.

Cur. adv. vult.

POLLOCK, C.B., now said—In this case there will be no rule. Where, by the contract itself, the certificate of a surveyor is made a condition precedent to the right to payment, even if it be withheld by fraud, that is only the subject of a cross action. The nonsuit, therefore, was right.

Rule refused.

BATTERBURY *v.* VYSE.

IN THE EXCHEQUER, APRIL 22, 1863.

[*Reported in* 2 *Hurlstone and Coltman* 42.]

DECLARATION.—For that heretofore, to wit, on, etc., the plaintiff and the defendant agreed that the defendant should employ the plaintiff to do and provide for him, and that the plaintiff should do for the defendant certain specified works, and provide for the defendant certain specified materials, at No. 125 Oxford Street, upon the following terms and conditions ; that is to say, "All the works hereinbefore described (meaning the description contained in a certain specification of the said works) are to be executed in the very best and most workmanlike manner, with the very best quality of materials of every description, under the superintendence and to the satisfaction of Mr. Vyse and his architect. The works described are intended to embrace everything that may be necessary for the perfect completion of the several alterations. If, therefore, through any error or inadvertence, any matter or thing which may be deemed by the architect as essential to this end be omitted, it is to be supplied and performed by the contractor in like manner as if it had been particularly specified ; and if in the course of the work it should be found necessary to make any addition to or omission from the said works, such deviation is not in any way to vitiate the contract, but the value of such works shall be estimated by the architect, and the value thereof added to or deducted from the contract sum as the case may be, the decision of the architect being final and conclusive in all matters affecting the proposed works. The amount of the contract will be paid by instalments equal to the value of £80 per cent. of the value of the works executed, the balance within

one month after final completion to the architect's satisfaction, but no payment will be considered due unless upon production of the architect's certificate." (Then followed an agreement by the defendant to execute the works for £610.)—Averments: that pursuant to the contract the plaintiff did the specified works and provided the materials, with the exception of certain omissions which were duly required by the defendant and his architect; and that he also did divers and very many additional works which were duly required to be done by the defendant and his architect; and that the value of the said works and materials amounted to a large sum, to wit, £1000, whereof the defendant had due notice; and although the defendant paid to the plaintiff £600 on account of the said works, leaving a large balance, to wit, £400, of the fair and reasonable value of the said works, estimated according to the said contract, unpaid; and although the plaintiff had done all things necessary on his part to entitle him to have the value of the said extras and omissions estimated by the said architect, and to entitle him to the said architect's certificate for payment; and although he had completed the said works to the satisfaction of the defendant's architect; and although more than a month from such time had elapsed; and although the defendant and his architect had, at all times since the doing of the said works and the providing of the said materials, had full knowledge that the plaintiff was entitled to be paid by the defendant a large sum of money over and above the money so paid, and although a reasonable time for the said architect to estimate the value of the said additions and omissions, and to certify as aforesaid, and for the defendant to pay for the said works, had long since elapsed, yet the architect had not estimated the value of the said additions and omissions, nor had he certified as aforesaid, but wholly neglected so to do, and had unfairly, improperly, and contrary to the true intent and meaning of the said contract, neglected to estimate the value of the said additions and omissions, and neglected to certify as aforesaid, and had so neglected in collusion with the defendant and by his procurement. By means of which premises the plaintiff has been unable to obtain payment of the balance justly due to him for the said works, and the said balance still remains wholly due and unpaid to the plaintiff.

Demurrer and joinder therein.

Gates in support of the demurrer. The declaration is bad. The production of the architect's certificate is a condition precedent to the plaintiff's right to claim any payment [Martin, B. This is, in substance, a declaration in case, alleging that the

defendant, acting in collusion with the architect, procured him unfairly and improperly to withhold his certificate.] Treated as an action of contract, the plaintiff cannot recover, because he has not complied with the condition which entitled him to payment; and it is not an action on the case, because it does not charge fraud, or allege any duty on the part of the defendant which he has neglected to perform. However unreasonable and oppressive a stipulation or condition may be, a Court of law is bound to give effect to the terms agreed upon between the parties. Stadhard *v.* Lee, 3 B. & S. 364, 372 (E. C. L. R. Vol. CXIII.). [Bramwell, B. That case does not touch this. Here the complaint is not that something has been done, and done wrongly, but that there has been an improper refusal to do that which ought to have been done.] The opinion of Erle, J., in Scott *v.* The Corporation of Liverpool, 1 Giff. 216, 223, is an express authority that, in the absence of fraud, the withholding the certificate by the architect affords no right of action against the defendant, either on the ground of a waiver of the condition, or the substitution of a new contract, or on the ground of a wrong. This is an attempt to obtain indirectly that which the plaintiff is not entitled to by the terms of his contract. If, indeed, the certificate was withheld by fraud, the plaintiff might have a remedy by action. Milner *v.* Field, 5 Exch. 829. But it is consistent with every allegation in this declaration that the architect was requested by the defendant not to certify because he was dissatisfied with the work. [Wilde, B. The declaration contains an averment that the plaintiff had done all things necessary to entitle him to the certificate, and that he had completed the works to the satisfaction of the defendant's architect; and that, although the defendant and his architect had knowledge that the plaintiff was entitled to be paid, the architect neglected to certify, "in collusion with the defendant and by his procurement."] There is no allegation that the works were done to the satisfaction of the defendant. [Wilde, B. There is an averment that the plaintiff had done all things necessary to entitle him to the certificate.] The word "collusion" does not necessarily imply fraud. [Pollock, C.B. In Webster's Dictionary one definition of "collusion" is "a secret agreement for a fraudulent purpose."]

J. Brown appeared in support of the declaration, but was not called upon to argue.

POLLOCK, C.B. We are all of opinion that the declaration is good, and that the plaintiff is entitled to judgment.

MARTIN, B., and BRAMWELL, B., concurred.

Judgment for the plaintiff.

CLARKE, Assignee of the Estate and Effects of FRANCIS AYERS, a Bankrupt, and Others *v.* WATSON and Another.

In the Common Pleas, January 25, 1865.

[*Reported in* 18 *Common Bench Reports, New Series*, 278.]

The first count of the declaration stated, that, theretofore, and before the said Francis Ayers became bankrupt, to wit, on October 9th, 1862, by an agreement in writing then made and entered into between the said Francis Ayers, William Mallows, and William Johnson, therein called "the contractors," of the one part, and the defendants of the other part, the said contractors agreed with the defendants to do certain works therein mentioned, in conformity with certain plans, drawings, and sections therein mentioned, and also in conformity with certain specifications therein mentioned, as well as to the satisfaction and approval of the engineer to a certain board of health for the time, should such be found necessary, at or for £312 15*s.*, to be paid as follows, £156 7*s.* 6*d.* on production by the contractors to the defendants, or one of them, of the certificate of William Lambert, or other the surveyor for the time of the defendants, that they, the contractors, had duly and efficiently performed and completed such portion of the work as, according to the judgment of the said surveyor, should be not less than three-fourth parts thereof in extent and value; £78 3*s.* 9*d.* on the production by the said contractors to the defendants, or to one of them, of the certificate of the said surveyor as aforesaid that the whole of the works mentioned and referred to in the said plans, drawings, and specifications, had been duly and efficiently performed and completely finished to his satisfaction, and also to the satisfaction of the said engineer for the time being of the local board of health, if necessary; and the balance of £78 3*s.* 9*d.* at the expiration of four months from the date of the said surveyor's certificate of completion; provided the therein-mentioned roads, pathways, drains, and culverts, and every part thereof, should be certified by the said surveyor to be in good repair, and in perfect and sound condition in all respects—it being thereby intended and agreed that all the said works and materials should be so put and kept in good repair until the expiration of such four months from completion, by and at the sole cost and expense of the said contractors; and the defendants thereby agreed with the said Francis Ayers,

William Mallows, and William Johnson, in consideration of the due performance of the said agreements therein contained on their part, to pay to them the sum of £312 15*s.* at the time and in the manner therein-before mentioned: Averment, that, although £156 7*s.* 6*d.*, part of the said sum of £312 15*s.*, had been paid, and all things necessary on the part of the said contractors to entitle them to have the certificate of the surveyor of the defendants that the whole of the works in the said plans, drawings, and specifications, had been duly and efficiently performed and completed to his satisfaction, and also to the satisfaction of the engineer of the said local board of health, had been done and performed by them; yet the said surveyor had not given such certificate, but had wrongfully and improperly neglected and refused so to do, nor had the defendants paid the said sum of £78 3*s.* 9*d.* payable on such certificate; and that, although more than four months since the said surveyor ought to have given such certificate had elapsed, and although all things had been done by the said contractors on their part to entitle them to a certificate by the said surveyor that the said roads, pathways, drains, culverts, and every part thereof, were at the expiration of the said four months in good repair, and in perfect and sound condition in all respects, yet the said surveyor had not granted such certificate, but had wrongfully and improperly neglected and refused to do so, and the defendants had not yet paid the said balance of £78 3*s.* 9*d.*

The defendants demurred to this count; and the plaintiffs joined in demurrer.

Henry James in support of the demurrer.

Parry contra.

ERLE, C.J. I am of opinion that the judgment in this case ought to be for the defendants. The contract which they entered into was, to pay to the contractors, the plaintiffs, certain sums on production by them to the defendants, or one of them, of the certificate of William Lambert or other the surveyor for the time of the defendants. Many contracts are so made. Every man is the master of the contract he may choose to make: and it is of the highest importance that every contract should be construed according to the intention of the contracting parties. And it is important in a case of this description that the person for whom the work has been done should not be called upon to pay for it until some competent person shall have certified that the work has been properly done according to the contract and specification. Here, the contract is, that the money shall become payable on production by the plaintiffs to the defendants of the certificate of their (the

defendants') surveyor, that the contractors have duly and efficiently performed and completed the work to his satisfaction. No such certificate has been produced. But it is said that the plaintiffs have done all things necessary to entitle them to have the certificate of the surveyor that the works had been duly performed and completed to his satisfaction, and that the said surveyor had "wrongfully and improperly" neglected and refused so to do. That, in my opinion, is not sufficient. If it had been alleged that the defendants wrongfully colluded with the surveyor to cause the certificate to be withheld, they could not have sheltered themselves by their own wrongful act. But the word "wrongfully," as used here, does not intimate anything of that sort. If the plaintiffs had intended to rely on the withholding of the certificate as a wrongful act on the part of the defendants, they should have stated how it was wrongful. This is in effect an attempt on the part of the plaintiff to take from the defendants the protection of their surveyor, and to substitute for it the opinion of a jury. That is not the contract which the defendants have entered into. The allegations on the part of the plaintiffs are not, in my judgment, such as to entitle them to succeed.

KEATING, J., concurred.

Judgment for the defendants.[1]

MICHAEL NOLAN ET AL., RESPONDENTS, *v.* CORDELIA C. WHITNEY, APPELLANT.

IN THE COURT OF APPEALS OF NEW YORK, FEBRUARY 28, 1882.

[*Reported in* 88 *New York Reports* 648.]

IN July, 1877, Michael Nolan, the plaintiffs' testator, entered into an agreement with the defendant to do the mason work in the erection of two buildings in the city of Brooklyn for the sum of $11,700, to be paid to him by her in instalments as the work progressed. The last instalment of $2700 was to be paid thirty days after completion and acceptance of the work. The work was to be performed to the satisfaction and under the direction of M. J. Morrill, architect, to be testified by his certificate, and that was to be obtained before any payment could be required to be made. As the work progressed, all the instalments were paid except the last, and Nolan, claiming that

[1] The concurring opinion of Williams and Willes, JJ., have been omitted.—ED.

he had fully performed his agreement, commenced this action to recover that instalment. The defendant defended the action upon the ground that Nolan had not fully performed his agreement according to its terms and requirements, and also upon the ground that he had not obtained the architect's certificate, as required by the agreement.

Upon the trial the defendant gave evidence tending to show that much of the work was imperfectly done, and that the agreement had not been fully kept and performed on the part of Nolan ; the latter gave evidence tending to show that the work was properly done, that he had fairly and substantially performed his agreement, and that the architect had refused to give him the certificate, which, by the terms of his agreement, would entitle him to the final payment. The referee found that Nolan completed the mason work required by the agreement according to its terms ; that he in good faith intended to comply with, and did substantially comply with, and perform the requirements of his agreement ; but that there were trivial defects in the plastering for which a deduction of $200 should be made from the last instalment, and he ordered judgment in favor of Nolan for the last instalment, less $200.

The Court say : " It is a general rule of law that a party must perform his contract before he can claim the consideration due him upon performance ; but the performance need not in all cases be literal and exact. It is sufficient if the party bound to perform, acting in good faith, and intending and attempting to perform his contract, does so substantially, and then he may recover for his work, notwithstanding slight or trivial defects in performance, for which compensation may be made by an allowance to the other party. Whether a contract has been substantially performed is a question of fact depending upon all the circumstances of the case to be determined by the trial court. Smith *v.* Brady, 17 N. Y. 189 ; Thomas *v.* Fleury, 26 N. Y. 26 ; Glacius *v.* Black, 50 N. Y. 145 ; Johnson *v.* DePeyster, 50 N. Y. 666 ; Phillip *v.* Gallant, 62 N. Y. 256 ; Bowery Nat. Bank *v.* The Mayor, 63 N. Y. 336. According to the authorities cited under an allegation of substantial performance upon the facts found by the referee, Nolan was entitled to recover unless he is barred because he failed to get the architect's certificate, which the referee found was unreasonably and improperly refused. But when he had substantially performed his contract, the architect was bound to give him the certificate, and his refusal to give it was unreasonable, and it is held that an unreasonable refusal on the part of an architect in such a case to give the certificate dispenses with its necessity."

Oscar Frisbie for appellant.
N. H. Clement for the respondent.
EARL, J., reads for affirmance.
All concur.
Judgment affirmed.

WILLIAM CHISM *v.* CHARLES SCHIPPER.

IN THE SUPREME COURT OF JUDICATURE OF NEW JERSEY, NOVEMBER TERM, 1888.

[*Reported in* 51 *New Jersey Law Reports* 1.]

ON demurrer to declaration. On case certified from the Essex Circuit Court.

The declaration was founded on a building contract, under seal, whereby it was alleged the plaintiff agreed to "erect and finish" a certain dwelling-house "agreeably to the drawings and specifications by Oscar S. T., architect, within the time aforesaid, in a good, workmanlike, and substantial manner, to the satisfaction and under the direction of said architect, to be testified by a writing or certificate, under the hand of said architect;" that the plaintiff was to furnish all materials, etc., and that for his work and materials he was to be paid the sum of $6050; that if the defendant requested alterations, additions, or omissions, which, at a reasonable valuation, were to be deducted from or added to the contract price; that the defendant did request certain alterations (which were specified), which were made, to the value of $600; that it was further provided that in case of a dispute arising as to the true construction or meaning of the drawings or specifications, the said architect was "to decide the same, and whose decision should be final and conclusive." Full performance on the part of the plaintiff is alleged

The breach is that the said architect "wilfully and fraudulently decides that the aforesaid alterations, deviations, and additions are within the true construction of said drawings and specifications referred to in the said contract, and that the plaintiff is not entitled to be paid the fair and reasonable value thereof, and wilfully and fraudulently withholds from the plaintiff, and refuses to sign the certificate, required by said contract, for the fifth and last payment called for thereby; which fraudulent and wilful decision of the architect, and

fraudulent and wilful withholding of the said certificate have been brought to the knowledge of the said defendant by the said plaintiff; but the said defendant, though often," etc., "hath not paid the said sum of $600," etc.

This count was demurred to, and the issue thus raised was certified for the opinion of the Supreme Court.

Argued at June Term, 1888, before Beasley, C.J., and Knapp, Magie, and Garrison, JJ.

Craig A. Marsh for the demurrant.

Edward M. Colie for the plaintiff.

The opinion of the Court was delivered by

BEASLEY, C.J. A comprehension of the facts stated in the summary of the declaration prefixed to this opinion will make it manifest that the question to be decided is, Can the defendant cheat the plaintiff by due course of law?

The case, in brief, is this: The plaintiff has done work for the defendant to the value of $600, which work was additional to that specified in the written contract; the money was payable on the certificate of the architect, whose decision was to be final; such architect fraudulently decided that the work in question was not additional, but was embraced in the contract, and the defendant, being notified of the facts, refused to pay the demand. As the demurrer confesses the truth of this statement, it will be observed that the defendant stands now before the Court saying: I admit that this money is due for additional work; I admit that the architect fraudulently certifies to the contrary; and I claim, that by a correct application of legal principles, I have the right to take advantage of this fraud, and to appropriate to myself the moneys that are its fruits. The inquiry is, Does the law, in reality, justify this immoral attitude?

It should be premised to the inquiry, that if this action will not lie, neither will any action lie against the defendant, founded on the facts stated, either at law or in equity. As such a result would be one much to be deprecated, and would stand as a blot on the jurisprudence of the State, it would seem that the most cogent reasons should be forthcoming to afford a satisfactory answer to the interrogatory: Why should a man be permitted to take advantage of the fraud of another? The only known reply is, that the plaintiff has covenanted to that effect; that he has agreed that the action of the architect, whether honest or dishonest, shall be conclusive.

It is proper to say, *in limine*, that it is not by any means deemed certain that this contract, if to be read in the sense just specified, is sustainable in law. It is assumed that a man

cannot contract that he himself may commit a fraud ; for example : this defendant could not have agreed that this money should not be payable except on his own written certificate, and that he might fraudulently withhold such certificate. If such a stipulation would, as it is thought, be expurged from the instrument on grounds of public policy, how can the party legally stipulate that another may commit this same crime for him ? The capacity of parties to a contract to provide that one or the other, as the case turns out, may be cheated, does not appear to be a faculty requisite in the transaction of any legitimate business ; while, at the same time, its existence is palpably offensive to good morals, and, consequently, may well be said to be adverse to the public welfare. The consequence is that it is, in my opinion, doubtful whether such an agreement can be legally made ; but it is not deemed necessary to pursue the inquiry, inasmuch as, by proper rules of construction, applied to the facts set forth in this record, the proper conclusion is, that the contract existing between these parties does not contain this stipulation, so highly questionable.

The inquiry is : What did these parties mean ? Did they intend, or by reason of the language employed must it be concluded *de jure*, that they intended, to be bound by the award of the architect, even though such award was the creature of fraud ?

The clause thus referred to is in the common form, that has long been in frequent use ; and yet, it may be safely said, that it is most improbable that it would have been adopted in a single instance if it had expressed in plain terms the meaning that it is now contended lies latent in its expressions. It is hard to believe that any self-respecting man would put his name to an agreement that a third party might do in his favor a fraudulent act. Nor does it seem probable that to the ordinary mind any suggestion of so extraordinary a purpose would be made by the generality of the expressions of this clause of the contract under criticism. And this last is an important consideration, for it is truly remarked by Gibson, C.J., in Schuykill Nav. Co. *v.* Moore, 2 Whart. 477, 491, that in the interpretation of contracts " the best construction is that which is made by viewing the subject of the contract, as the mass of mankind would view it, for it may be safely assumed that such was the aspect in which the parties themselves viewed it." Tested by this standard, it would seem to be certain that the construction of this term of the contract insisted on by the defence in this case cannot prevail.

But the adverse argument is, that the agreement of the

parties is to be ascertained from the plain language used by them, and such agreement is to be enforced, no matter what the intention may have been.

This is the general rule, beyond a doubt, but such required literalism is not to be pushed to the preposterous length of requiring, that by its operation the general intention of the parties, as evidenced by their contract itself, shall be frustrated or perverted, either in whole or in part. The terms employed are servants and not masters of a perspicuous intent; they are to be interpreted so as to subserve and not to subvert such intent. As an illustration: it plainly appears on the face of this instrument that it was the evident and sole purpose of the provision in question to provide for the fair and definite decision of certain matters; and it is now said that by force of the terms used, the decider is empowered to cheat either party at will; and yet it is obvious that the existence of such a power in the agent has no tendency to effectuate the object in view, but so far as it can operate, it is destructive of it. The stipulation giving the quality of finality to the action of their agent, is part of a contrivance of these parties to enforce fair dealing between them in certain particulars; there seems to be no reason why they should impart to such a contrivance a fraudulent potency. It was quite reasonable for these parties to say to their agent, decide honestly between us, and your decision shall be final; but it was utterly unreasonable for them to agree to abide by such award if it were fraudulent. For my own part, I do not believe that in the history of the human race, the transaction has occurred in which a man has consciously agreed that another should be clothed with the power to cheat him, and that the decision of the fraudoer should be conclusive on the subject. And in the present instance such a stipulation can be construed only by an abstract interpretation of the conventional terms; for, if such language be construed as a part of an integer, and in the view of purpose in hand, it can be made to produce no such result. There is no more important rule of construction than that which requires that words shall be interpreted in the reflected light of the context in which they are found. And applying this rule to the case in hand it is not perceived how it can be reasonably said that these parties have given to the provision in question that noxious efficacy that is sought to be imparted to it.

That the clause under discussion cannot be, out and out, construed literally, appears to be undeniable. This and similar engagements are never so read. Undoubtedly, if we construe these terms with entire literalness, the builder is required to

produce, before he can claim the money due him, the certificate of the architect. There are no exceptions provided for nor indicated if the language is thus alone regarded. But suppose the money be earned, and the architect die before the signing of the certificate, is the claim lost or forfeited? Such a result, it is presumed, would not be claimed; and yet it is avoidable only in one way, and that is, to construe the terms of the contract reasonably as applied to their subject, and not literally. The exception can stand on no other ground than this, for the maxim, "*actus dei nemini facit injuriam*," is never applied in violation of a contract. Looking to the letter alone, these parties have said that under all possible circumstances the certificate shall be a condition precedent to the right to payment. Admitting this as the true construction, the impossibility of the performance of such condition would not avoid it; and that such an effect has never been judicially given to such provisions, shows conclusively that they have been interpreted according to their spirit and not in subservience to their very letter.

And, indeed, in my view, the entire legal course that has been pursued in the construction of submissions to arbitration, in the common-law form, can be explained only on the ground that they have been construed liberally and not with literal narrowness. In all these submissions the stipulation is in the most unqualified form, that the award shall be final and conclusive; but if such award be tainted with fraud, it is set aside on the application of the party. And yet, it is plain that such party could not be permitted to make such application if his submission is to be read by its letter, and thus made to mean an engagement on his part to abide by the award, whether honest or dishonest. In such cases it has never been pretended that the parties by the terms of their submission, reasonably understood, meant anything of the kind. The grounds of decision in that entire class of cases would seem to be precisely applicable to the present case.

As another illustration of the principle that a literal interpretation is out of place when its adoption will run counter to the expressed general object of the contract, reference may be made to the familiar case of clauses so frequent in leases, that if the rent is in arrear for a certain time the instrument shall become void. In all these instances the courts have declared, notwithstanding the literal meaning of the terms, that the lease, on the happening of the event, is not absolutely vacated, but only becomes voidable at the option of the lessor.

In fine, it appears to me that the foregoing construction of

the clause of the contract in question rests upon the triple ground of legal principle, authority, and public policy.

I think on this issue the plaintiff should have judgment.[1]

MAGIE, J. (dissenting).[2]

CHICAGO, SANTA FÉ AND CALIFORNIA RAILROAD COMPANY *v.* PRICE.

IN THE SUPREME COURT OF THE UNITED STATES, JANUARY 26, 1891.

[*Reported in* 138 *United States Reports* 185.]

THIS action was brought by Price, McGavock & Co., for the use of Jones, Forrest & Bodkin, to recover from the Chicago, Santa Fé and California Railroad Company the balance alleged to be due them under a written contract, made March 21st, 1887, for the clearing, grubbing, and masonry necessary to complete the road-bed of that company from a point on the Mississippi River to Galesburg, Illinois, a distance of about fifty miles. The parties in writing waived a jury and tried the case before the Court, which made a special finding of facts.[3] There was a judgment against the railroad company. 38 Fed. Rep. 304.

The contract contained, among other provisions, the following:

"2d. The work shall be executed under the direction and supervision of the chief engineer of said railway company and his assistants, by whose measurements and calculations the quantities and amounts of the several kinds of work performed under this contract shall be determined and whose determination shall be conclusive upon the parties, and who shall have full power to reject or condemn all work or materials which in his or their opinion do not fully conform to the spirit of this agreement; and said chief engineer shall decide every question which can or may arise between the parties relative to the execution thereof, and his decision shall be binding and final upon both parties; and whereas the classification of excavation provided for in the annexed specifications is of a character that makes it necessary that special attention should be called to it, it is expressly agreed by the parties to this contract that

[1] A portion of the opinion containing a citation of authorities has been omitted.—ED.

[2] The dissenting opinion of Magie, J., has been omitted.—ED.

[3] The finding of facts has been omitted.—ED.

the determination, by the measurements and calculations of the said engineer, of the respective quantities of such excavation shall be final and conclusive."[1]

Norman Williams and *Charles S. Holt* for plaintiff in error.

P. S. Grosscup for defendants in error.

HARLAN, J., after stating the case, delivered the opinion of the Court.

The written contract between the parties in this case does not materially differ from the one before this Court in Martinsburg & Potomac Railroad Co. *v.* March, 114 U. S. 549, 553. In that case the contractor did not allege in his declaration that the engineer ever certified in writing the complete performance of the contract, together with an estimate of the work done and the amount of compensation due him according to the prices established by the parties; which certificate and estimate was made by the agreement a condition of the liability of the company to pay the contractor the balance, if any, due him. Nor did the declaration allege any facts which, in the absence of such a certificate by the engineer whose determination was made final and conclusive, entitle the contractor to sue the company on the contract. It was held, in accordance with the principles announced in Kihlberg *v.* United States, 97 U. S. 398, and Sweeney *v.* United States, 109 U. S. 618, that the declaration was fatally defective in that it contained "no averment that the engineer had been guilty of fraud, or had made such gross mistake in his estimates as necessarily implied bad faith, or had failed to exercise an honest judgment in discharging the duty imposed upon him." Some observations in that case are pertinent in the present one. It was said: "We are to presume from the terms of the contract that both parties considered the possibility of disputes arising between them in reference to the execution of the contract. And it is to be presumed that in their minds was the possibility that the engineer might err in his determination of such matters. Consequently, to the end that the interests of neither party should be put in peril by disputes as to any of the matters covered by their agreement, or in reference to the quantity of the work to be done under it, or the compensation which the plaintiff might be entitled to demand, it was expressly stipulated that the engineer's determination should be final and conclusive. Neither party reserved the right to revise that determination for mere errors or mistakes upon his part. They chose to risk his estimates, and to rely upon their right, which the law presumes they did not intend to waive, to

[1] The other provisions of the contract have been omitted.—ED.

demand that the engineer should, at all times, and in respect to every matter submitted to his determination, exercise an honest judgment, and commit no such mistakes as, under all the circumstances, would imply bad faith."

The only difference between that case and the present one is that the alleged mistakes of the engineer in the former were favorable to the railroad company, while in this case they are favorable to the contractors. But that difference cannot affect the interpretation of the contract. In the present case the agreement was that the work should be executed under the direction and supervision of the chief engineer of the railroad company and his assistants, by whose measurements and calculations the quantities and amounts of the several kinds of work should be determined, and "whose determination shall be conclusive upon the parties." Any decision of the chief engineer relating to the execution of the contract was to be "binding and final upon both parties." His measurements and calculations as to excavations were made "final and conclusive."

What are the substantial facts found by the court below? The work was in four divisions, each division being in charge of an assistant or division engineer, who acted under the general direction of the chief engineer. The agreement provided for monthly payments to the contractor, on the certificate of the engineer, "for work done;" ten per cent. from the value thereof to be retained by the company until the whole work was completed in accordance with the contract. The work was under the immediate supervision of the division engineer. On the first day of each month he made up and forwarded to the assistant chief engineer an estimate of work done on each section of his division, according to quantities and classifications. Upon such estimates the assistant chief engineer ascertained the amount due the contractor to the beginning of the month. These monthly estimates were approved by both the assistant chief engineer and chief engineer. This course was pursued until the work was substantially completed, and was accepted and taken possession of by the company. Subsequently, without the knowledge or co-operation of the contractors, Baker, a subordinate engineer of the railroad company, who had not supervised the work of the plaintiffs, re-estimated and reclassified it, and upon such re-estimate and reclassification, which were approved by the chief engineer, the company claimed that the monthly estimates upon which the plaintiffs had been paid from time to time were much too large.

We are of opinion that the ultimate facts, as found by the

Court, do not authorize the railroad company to go behind the estimates from time to time by its division engineer, which were approved and certified by the assistant chief engineer and chief engineer. Within a reasonable interpretation of the contract, the last monthly estimate of work done on division nine (that being the only division here in dispute), followed by the acceptance by the company of the whole work, was a certificate of complete performance entitling the plaintiff to be paid in full according to the terms of the contract. While there was evidence tending to show that the estimates by the division engineer, upon which the last monthly certificate was based, were not made up from actual measurements on the ground, but from reports by subcontractors, there was, also, evidence tending to show that the remeasurements and reclassifications which the company caused to be made after the completion and acceptance of the work, and which it calls the "final estimate," were inaccurate. But there is no fact distinctly found indicating fraud upon the part of the company's engineers, or such gross mistakes by them as imply bad faith. It is found only that the monthly estimates might, with reasonable care, have been made nearly accurate, and that, if the remeasurements and reclassifications were correct, the discrepancy between them and the monthly estimates, upon which the plaintiffs were paid from time to time, could be explained only upon the ground of negligence, incompetency or dishonesty upon the part of the division engineer. But the Court did not find that the monthly estimates were inaccurate, or that the chief or division engineer was dishonest, or that the subsequent remeasurement and reclassification were correct. The mere incompetency or mere negligence of the division or chief engineer does not meet the requirements of the case, unless their mistakes were so gross as to imply bad faith.

We are of opinion that the judgment is supported by the finding of facts, and it is

Affirmed.

THURNELL *v.* BALBIRNIE.

In the Exchequer, Trinity Term, 1837.

[*Reported in* 2 *Meeson & Welsby* 786.]

The first count of the declaration stated, that before and at the time of making the agreement and the promise and undertaking of the defendant thereinafter mentioned, the defendant held, occupied, and enjoyed, at his request, certain rooms, apartments, and premises of the plaintiff, as tenant thereof to

the plaintiff, the same then being part and parcel of a dwelling-house of the plaintiff, and in which there were certain goods and fixtures and chattels, to wit, etc., of the plaintiff, of great value, to wit, of, etc.; and thereupon heretofore, to wit, on December 26th, 1836, it was agreed by and between the plaintiff and the defendant in manner following; that is to say, the plaintiff then agreed to sell and deliver to the defendant, who then agreed to purchase and take of the plaintiff, the said goods, fixtures, and chattels, at a valuation to be made by certain persons, to wit, Mr. Newton and Mr. Matthews, or their umpire: and the plaintiff said, that the said Mr. Newton was appointed by and on behalf of the plaintiff, and the said Mr. Matthews by and on behalf of the defendant, to value as aforesaid. The declaration then averred mutual promises, and alleged that Newton, on behalf of the plaintiff, was ready and willing to value the said goods, etc., and at the request and by the authority of the plaintiff requested Matthews to value the same, whereof the defendant and Matthews had notice; but that the defendant and Matthews then and thence continually neglected and refused so to do: and the plaintiff further said, that he, the plaintiff, afterward, to wit, on February 2d, 1837, gave notice to the defendant that the plaintiff's said appraiser and valuer, the said Newton, was ready to meet the defendant's appraiser and valuer, the said Matthews, or any other person he might think proper to nominate for the purpose on the defendant's behalf, at any time within ten days from the said February 2d, which the defendant might fix, to value the said goods, etc., of which the defendant then had notice, but then and thence hitherto wholly neglected and refused to appoint any day for his appraiser, the said Matthews, to value, and wholly neglected and refused to nominate any other appraiser, and during all that time has wholly refused and neglected to take any steps to value as aforesaid, or to cause or procure the same to be valued according to his said agreement and promise, and has during all the time aforesaid wholly refused to value the said goods, etc., or to let the same be valued, according to his said agreement and promise: And thereupon the said Mr. Newton, afterward, and after the lapse of a reasonable period of time, to wit, one month from the day and year last aforesaid, proceeded to value and did then value the said goods, etc., and the price thereof, upon such valuation, reasonably amounted to the sum of £500, whereof the defendant had notice, and was requested to pay the same to the plaintiff: and the plaintiff further says, that he had always from the time of making such valuation as aforesaid been ready and willing to

sell and deliver to the defendant the said goods, etc., and to receive payment by him of the value thereof, whereof the defendant had always had notice; yet the defendant, not regarding, etc., did not nor would, although often requested, take the said goods, etc., so agreed by him to be taken as aforesaid, and pay the plaintiff the value thereof, but had hitherto wholly neglected and refused so to do, whereby, etc.

There were also counts for goods and fixtures bargained and sold, and on an account stated.

Special demurrer to the first count, assigning, among other causes, the following: that the count does not sufficiently allege a breach of the defendant's promise therein mentioned, for that it does not allege that the defendant hindered or prevented the said persons appointed and agreed on to make the said valuation, or either of them, from making such valuation. And also that it is alleged by way of breach that the defendant refused to take the goods, etc., agreed by him to be taken, and that he also refused to pay the plaintiff the value of the said goods, etc., and no agreement or promise is stated in the said count, to take the said goods, etc., at their value generally, or at the valuation made by the said Mr. Newton, but at the valuation only of the said Newton and Matthews, or their umpire.

Joinder in demurrer.

Kelly in support of the demurrer.

Hoggins to support the declaration.

Lord ABINGER, C.B. I am of opinion that this count is bad.

The agreement stated is an agreement to purchase the goods on the valuation of Newton and Matthews. There is no distinct allegation that the defendant refused to permit Matthews to value on his part; but only an obscure statement that he refused to appoint any day for his valuing, or to take any steps to value or to cause and procure the goods to be valued according to his agreement, and that he has refused to value the goods, or to let them be valued, according to his agreement: all which comes after the allegation that Matthews had refused to value, there being no statement that he had changed his mind, and was ready and willing to do so, but that the defendant would not permit him. I am of opinion, therefore, that enough is not stated to render the defendant liable for the price of the goods.

BOLLAND, B., concurred.

ALDERSON, B. I should refer the words "or to let the same be valued," etc., to the defendant's letting the goods be

valued by another appraiser instead of Matthews, according to the notice which the plaintiff says he gave him.

GURNEY, B., concurred.

Leave to amend on payment of costs; otherwise judgment for the defendant.

ROPER *v.* LENDON.

IN THE QUEEN'S BENCH, APRIL 30, 1859.

[*Reported in* 1 *Ellis & Ellis* 825.]

DECLARATION against the defendant as secretary of the Kent Fire Insurance Company, on a policy of insurance against fire effected by the plaintiff with the said company on the household furniture and effects, stock in trade, fixtures and fittings in his dwelling-house. The declaration set out the policy, which was granted subject to certain conditions thereon endorsed, also set out, of which the following only are material.

Condition 10. The amount of every loss will be paid, without any discount or deduction, immediately after the same shall have been established to the satisfaction of the directors; but they reserve to themselves in all cases the option of reinstating within a reasonable time.

Condition 15. All persons insured by this company sustaining any loss or damage by fire, shall forthwith give notice thereof to the directors or secretary of this company, at their office in Maidstone, and, within fifteen days after such fire, deliver in as particular an account of their loss or damage as the nature of the case will admit of, and shall also make proof of the amount of such loss or damage, by his, her, or their solemn declaration or affirmation, by their books or accounts, and by such other proper vouchers as shall be reasonably required. In case any difference or dispute shall arise between the insured and the company, touching any loss or damage, or otherwise in respect of any insurance, such difference shall be submitted to the judgment and determination of two indifferent persons as arbitrators, of whom one shall be chosen by this company and the other by the insured, and such two arbitrators shall, previously to entering upon the reference, agree upon and nominate a third person to be an arbitrator with them; and the award in writing of any two of the three arbitrators so chosen shall be conclusive and binding on all parties; and if any fraud or false swearing shall appear on the part of the insured, and the same

shall be certified in writing by any two of the said arbitrators, the party insured shall forfeit all claim under the policy.

The declaration then averred that, while the policy was in full force, the plaintiff sustained loss and damage by fire, on the property described in the policy, to the amount of the sums therein specified as the value thereof ; that the plaintiff had done all things necessary to be done, and that all things had been done and had happened which were necessary to be done and to happen in order to entitle the plaintiff to have such loss and damage paid and made good to him by the company, and that the time for paying and making the same good elapsed before suit, of all which the company had notice ; but that the company did not pay or make good the loss.

Demurrer to the declaration. Joinder in demurrer.

The defendant also pleaded six pleas, the second and sixth of which were as follows :

Plea 2. That the plaintiff did not forthwith give notice of, or, within fifteen days after the said fire, deliver an account of his supposed loss or damage by fire as required by the said policy and condition in that behalf.

Plea 6. That this action is brought for and in respect of a difference and dispute between the said insured and the said company, touching the said loss and damage, within the meaning of the fifteenth of the conditions endorsed on the said policy ; and that the said company have never declined, but have always been ready and willing, to refer such difference and dispute to the judgment and determination of two indifferent persons as arbitrators, in manner provided by the said condition, of all which the plaintiff, before suit, had due notice ; and the said dispute or difference and the amount of the plaintiff's supposed loss or damage have never been determined as by the same condition is provided.

Demurrer to the second and sixth pleas respectively. Joinder in demurrer.

T. Jones (Northern Circuit) for the plaintiff.

Lush for the defendant.

Lord Campbell, C.J. The second plea is clearly good. The whole of the fifteenth condition, relating to the delivery of particulars of loss, must be taken together, *tale quale*. When, therefore, it is conceded that a delivery of such particulars, before action, is essential, it follows, from the wording of the condition, that the delivery must be within fifteen days after the loss. And the condition so construed is a very reasonable one ; it being obviously of great importance to the defendant's company to know, as soon as possible after a loss, the amount

claimed by the assured. The sixth plea is, as clearly, bad. The agreement to refer, contained in the fifteenth condition, is merely collateral to the agreement to pay. The courts will not, therefore, treat the agreement to refer as ousting their jurisdiction until there has been a reference. The distinction between the present case and cases like Scott *v.* Avery,[1] is plainly pointed out in the judgment there delivered in the House of Lords. The present case does not fall within that decision, and the defendant could have enforced the agreement to refer only by an application under the Common Law Procedure Act, 1854, § 11.

ERLE and CROMPTON, JJ., were absent.

Judgment for the plaintiff on the demurrers to the declaration and to the sixth plea, and for the defendant on the demurrer to the second plea.[2]

THE PRESIDENT, MANAGERS AND COMPANY OF THE DELAWARE & HUDSON CANAL COMPANY, APPELLANTS AND RESPONDENTS, *v.* THE PENNSYLVANIA COAL COMPANY, APPELLANT AND RESPONDENT.

IN THE COURT OF APPEALS OF NEW YORK, NOVEMBER 12, 1872.

[*Reported in* 50 *New York Reports* 250.]

THIS case comes up on cross-appeals by the respective parties from a judgment of the General Term of the Supreme Court in the third judicial district, affirming a judgment in favor of the plaintiffs, entered upon the report of a referee.

The action was brought to recover a sum alleged to be due from the defendant for additional toll, chargeable and collectible upon coal of the defendant transported over the plaintiffs' canal, after it had been enlarged, and to fix a permanent toll, to be charged and collected upon all of the defendant's coal transported after such enlargement.

The controversy arises out of a contract made between the plaintiffs and the Wyoming Coal Association, dated August 31st, 1847, the defendant having by contract assumed and become possessed of all the rights and liabilities of the association under such contract. The provisions material to the present controversy are in substance as follows: the plaintiffs agreed to allow the association to use their canal, as it then was, for the

[1] 5 H. L. Ca. 811.

[2] The concurring opinion of Hill, J, has been omitted.—ED.

purpose of transporting coal from where it should enter the same to tide-water, near the mouth of the Rondout Creek, on the Hudson River, charging and collecting therefor a toll of so much per ton.

The amount of this toll for each year was to be fixed on May 1st, and to be one half of the surplus of the average selling price per ton of the coal (assuming for a standard of price the Canal Company's contracts made up to May 1st, for sale of their coal to arrive by canal during the year), after deducting from such selling price the fixed sum of $2.50 per ton, which sum was assumed by both parties as the cost to the coal company of the coal laid down at tide-water.

The controversy in this case arose under the provisions which relate to the additional and permanent toll which should be chargeable and collectible in case the canal should be enlarged, and which are in the following words :

" And in case of an enlargement of the said canal, the said president, managers, and company, and their successors and assigns, may also charge and collect an additional toll on the coal transported, in pursuance of this agreement, at a rate per ton of 2240 pounds, to be established after the completion of the said enlargement, in the manner following,—viz.:

" The cost of transportation per ton on the said canal, between the point at which such coal shall enter the said canal and the point on the Rondout Creek at which said canal meets tide water, after the full effect of all the improvements previous to the said enlargement shall have been experienced, shall be fairly ascertained or estimated, the cost of transportation per ton on the said canal between those points, after the said enlargement shall have been completed, shall also be fairly ascertained or estimated, and one half of such portion of the reduction in the cost of transportation per ton on the said canal between those points, as shall be estimated to have been produced by the said enlargement and by no other cause, shall be the additional toll per ton, to be thereafter permanently charged.

" And if the managers of the said Delaware & Hudson Canal Company and the managers of the said Wyoming Coal Association shall not be able to agree as to the just and proper amount of reduction on the cost of transportation per ton on the said canal between the aforesaid points, and as to the portion of such reduction which shall be produced by the said enlargement, the questions between them, in respect thereto, shall be submitted to two persons, one of whom shall be chosen by the managers of the said company, and the other of whom

shall be chosen by the managers of the said association. And the persons so chosen shall, if themselves unable to agree, choose a third person, to whom also the said questions shall be submitted, and the decision made in writing and signed by those assenting thereto of the two persons first chosen, if they shall agree ; and if not, of a majority of the three persons chosen as aforesaid shall be final and obligatory on the parties hereto as to the question aforesaid."

The canal was afterward enlarged so as to admit the transit of boats carrying 125 tons, which was 75 tons more than the boats carried on the old canal. Having completed the enlargement the plaintiffs gave notice thereof to the defendant by letter dated July 28th, 1853, wherein they claimed that the enlargement had produced a saving in the cost of transportation of 40 cents a ton ; and that, under the contract, they had a right to charge and collect 20 cents per ton as additional toll ; defendant claimed there was no deduction.

A lengthy correspondence thereupon ensued in reference to an arbitration by which it appears that, although arbitrators were chosen, yet they never had a meeting nor was there a submission of the matters to them.

The referee decided that the determination by arbitrators, in case the parties did not agree as provided for by the contract, was not, nor was the fixing the amount of the reduction, either by concurrence of the parties or award of the parties, a condition precedent to plaintiffs' right to exact a payment of or to sue for such additional tolls. That the sums of freight actually paid by the Delaware & Hudson Canal Company, before and after the enlargement, did not furnish a proper standard for ascertaining or determining the actual cost of transportation. That the proper method was to determine, in respect to each period, the amount of a fair and reasonable freight, such as should be paid to the boatmen if they supplied the boat horses and crew ; and a proper method of ascertaining such fair and reasonable freight was by inquiring into and determining, upon the evidence, the aggregate cost for the year or season of a boat, such as was used upon the canal prior to the enlargement, and one of a species used after the enlargement and adopted by the referee for the purposes of the estimate, embracing a proper allowance for the use and depreciation of the boat, the cost of wages and board of the necessary crew, the use and keep of the horses, and all other items which go to make up the cost of transportation, and then inquiring into and determining the number of trips each would make under ordinary circumstances, what quantity of coal each would carry, and to divide the aggre-

gate expense by the number of tons each would carry during the season, and thus fix the cost per ton. Upon these bases, without allowing to plaintiffs the benefit by way of increase of toll, of the general advance of prices of material and labor after the enlargement, to which he held the plaintiffs not entitled, the referee found the reduction to be 10 cents per ton. He therefore fixed the amount of additional toll, to which plaintiffs were entitled, at 5 cents per ton. He further found that the reduction, applying the same measure of prices after the enlargement as before, was fifteen and thirty-nine one hundredths cents per ton ; and if plaintiffs were entitled to have the reduction thus estimated, that the additional toll should be seven and sixty-nine one hundredths cents per ton.

It appeared upon the trial that the business of coal transportation upon the canal had always been done by employing boatmen who purchased their boats of the companies, paying by instalments reserved out of each trip. Each boatman run his boat, paying all expenses and carried coal at a freight of so much per ton. It also appeared that the sum paid per ton, after the enlargement, was in fact more than before.

Plaintiffs appealed from so much of the judgment as omitted to allow them the amount of additional toll resulting from the rise in prices. Defendant appealed from the whole judgment.

Amasa J. Parker, *John H. Reynolds*, and *Stephen P. Nash* for the plaintiffs.

Charles F. Southmayd and *Lyman Tremain* for the defendant.

Allen, J. It appears to be well settled by authority that an agreement to refer all matters of difference or dispute that may arise to arbitration, will not oust a court of law or equity of jurisdiction.[1] The reason of the rule is by some traced to the jealousy of the courts, and a desire to repress all attempts to encroach on the exclusiveness of their jurisdiction ; and by others to an aversion of the courts, from reasons of public policy, to sanction contracts by which the protection which the law affords the individual citizens is renounced. An agreement of this character induced by fraud, or overreaching, or entered into unadvisedly through ignorance, folly or undue pressure, might well be refused a specific performance, or disregarded when set up as a defence to an action.

But when the parties stand upon an equal footing, and intelligently and deliberately, in making their executory contracts, provide for an amicable adjustment of any difference that may arise, either by arbitration or otherwise, it is not easy to assign

[1] Only so much of the opinion is given as relates to the question of arbitration.—Ed.

at this day any good reason why the contract should not stand, and the parties made to abide by it, and the judgment of the tribunal of their choice. Were the question *res nova*, I apprehend that a party would not now be permitted, in the absence of fraud or some peculiar circumstances entitling him to relief, to repudiate his agreement to submit to arbitration, and seek a remedy at law, when his adversary had not refused to arbitrate, or in any way obstructed or hindered the arbitration agreed upon. But the rule that a general covenant to submit any differences that may arise in the performance of a contract, or under an executory agreement, is a nullity, is too well established to be now questioned ; and the decision of the appeal of the present defendant does not make it necessary to inquire into the reasons of the rule, or question its existence. The better way, doubtless, is to give effect to contracts, when lawful in themselves, according to their terms and the intent of the parties ; and any departure from this principle is an anomaly in the law, not to be extended or applied to new cases unless they come within the letter and spirit of the decisions already made. The tendency of the more recent decisions is to narrow rather than enlarge the operation and effect of prior decisions, limiting the power of contracting parties to provide a tribunal for the adjustment of possible differences, without a resort to courts of law ; and the rule is essentially modified and qualified.

The agreement, which is the subject-matter of litigation in this action, was carefully prepared by astute counsel, and the contracting parties themselves were intelligent, shrewd, and practical business men of large experience ; and no injustice, therefore, will be done to either by interpreting the instrument, and every part of it, by the ordinary rules for the interpretation of written instruments. It may be assumed that every provision which was essential to protect the interests of either, and give effect to the actual intention of both was inserted in words well chosen to give clear and distinct expression to the views of the parties, and exclude every construction inconsistent with such intention or the agreement as actually made.[1]

The defendant only undertook to pay such rate of toll as should be established, as prescribed in the instrument, and cannot be compelled to acquiesce in the determination in any other manner, and until a rate is established, no liability is incurred under the contract or right of action given. This mode of adjustment and settlement of the rate is a part of the agreement for the additional toll, and modifies and qualifies the res-

[1] A portion of the opinion relating to the construction of the contract has been omitted—Ed.

ervation of the right so that the right does not attach until the same is established. The determination and adjustment is a condition precedent to the right to demand and receive the toll, and no action will lie until the condition has been performed. Whether, when established, it would retroact and give a right to the additional toll from the time of the completion of the enlargement need not be considered. Neither need the effect of a refusal of the defendant to arbitrate nor any act on its part hindering and obstructing an arbitration be considered as the omission to arbitrate, and the failure to establish the additional rate of toll according to the terms of the agreement was not caused by the defendant. The plaintiffs seek without any valid reason, so far as appears by the case, to enforce the payment of an additional toll not established in the manner, and by the agents agreed upon, but by another tribunal. The defendant may well say that is not the measure of liability to which it assented. Thus understood and interpreted, the case is not within the rule which nullifies contracts ousting the courts of their jurisdiction, but is within another rule equally well established by authority, and found in good reason, that a person may covenant that no right of action shall accrue till a third person has determined any differences that may arise between the parties to the covenant or determined the measure of the liability of the covenantor, and the amount to which the covenantee shall be entitled.

The decisions of the courts of this State are to this effect, and are authoritative, and would be obligatory upon us even if they were not as well grounded in principle as they are.

These are all the cases from our own courts that need be referred to.[1] The distinction between the two classes of cases is marked and well defined. In one class the parties undertake by an independent covenant or agreement to provide for an adjustment and settlement of all disputes and differences by arbitration, to the exclusion of the courts, and in the other they merely, by the same agreement which creates the liability and gives the right, qualify the right by providing that before a right of action shall accrue certain facts shall be determined or amounts and values ascertained, and this is made a condition precedent either in terms or by necessary implication.

This case is within the latter class, and the condition being lawful, the courts have never hesitated to give full effect to it. The cases of Kill *v.* Hollister, 1 Wils. 129; Thompson *v.* Charnock, 8 T. R. 139; Horton *v.* Sawyer, 4 H. & N. 643; Gray *v.* Wilson, 4 Watts. 39; Mitchell *v.* Harris, 2 Vesey, 129; Roper *v.*

[1] The citation of cases has been omitted.—Ed.

Landon, 1 Ellis (Q. B.), 825, and the other cases cited and relied upon by the plaintiffs, belong to the first class, and involved the validity of covenants which deprived the parties of the protection of the courts and ousted the courts of all jurisdiction. In none is the rule as qualified by the other class of cases questioned, and in some it is referred to with approval. The reports abound in cases in which the principle has been affirmed and applied. See Herrick *v.* Belknap, 27 Vermont, 673. In United States *v.* Robeson, 9 Peters, 319, it was held that when the parties in the contract fix on a certain mode by which the amount to be paid shall be ascertained, the party that seeks the enforcement of the agreement must show that he has done everything on his part which could be done to carry it into effect; that he cannot compel the payment of the amount claimed unless he shall procure the kind of evidence required by the contract, or show that, by time or accident, he is unable to do so. Story, J., in his work on Equity Jurisprudence, § 1457*a*, thus states the rule: "But under a contract to pay the covenantee such damages in a certain contingency as a third person shall award, there is, in the absence of fraud, no cause of action either at law or in equity, unless the award is made," citing Herrick *v.* Belknap, *supra*, and Scott *v.* Corporation of Liverpool, 3 De Gex & J. 334, as authorities. Scott *v.* Liverpool was the case of a contract for work, containing a provision for putting an end to the contract by the employer in a certain contingency, and that in such case they should pay the contractor such sum as the engineers should determine had been reasonably earned, and it was held that, in the absence of fraud or collision, no action could be maintained, until after an award was made. Here the contract is to pay an additional rate of toll to be established by arbitrators to be chosen. And see Brown *v.* Overbury, 11 Exch. 715.

Scott *v.* Avery, 5 House of Lords Cases, 811, is in principle on all fours with the case at bar, and, unless we are prepared to overrule or disregard it, is decisive. That was an action on policies of insurance, one of the conditions of which was that the sum to be paid for loss should, in the first instance, be ascertained by the committee, but if a difference arose between the insured and the committee, the difference was to be referred to arbitration in a way pointed out by the conditions, with a proviso that no one who refused to accept the amount settled by the committee should be entitled to maintain an action at law or suit in equity on his policy until the matter had been decided by arbitration, and then only for such sum as the arbitrators should award. It was held that these conditions were lawful,

and that till the award was made no action was maintainable. The House of Lords affirmed the judgment of the Court of Exchequer Chamber, reversing that of the Court of Exchequer. There, as in this case, in the language of Lord Campbell, the rules and regulations for ascertaining the amount to be paid made part of the contract, and it is not material that there the contract was express that no action should be brought until after the award, while in the contract before us it is implied. It is not necessary that it should be put in the technical form of a "condition precedent," and the courts will give effect to the real intention of the parties, as clearly indicated by the agreement. See American note to Braunstein *v.* Accidental Death Ins. Co., 1 Best & Smith, 101 Eng. Com. Law R. 783. When, as here, the agreement is that the covenanter shall pay such sum, and only such sum, as shall be determined by arbitrators, the procuring an award is as clearly a condition precedent to an action, as if the parties had added, "and no action shall be maintainable until after the award of the arbitrators." Such a clause would be surplusage, and its insertion a work of supererogation. Crowder, J., in making response to the question propounded by the lords to the judges, in Scott *v.* Avery, thus states the question and the answer to it: "Can a shipowner and an insurer enter into a valid agreement that the shipowner shall pay down a given sum, and that in consideration of such payment the insurer upon the loss of a given ship shall pay to the said owner, not the amount of the loss sustained by her through the perils of the sea, but only such sum of money as shall be settled and ascertained by arbitration. I am not aware of any legal objection to such a contract, whatever may be thought of its prudence. And I think the effect of such a contract is, that no action lies for the breach of it, until the same has been ascertained by arbitration." The judge lays no stress upon the form of the contract, but regards the provision for determining the amount to be paid by arbitration as in legal effect postponing the right of action until after the award is made.

The Lord Chancellor (Cranworth), in assigning his reasons for an affirmance of the judgment of the Court of Exchequer Chamber, says: "That the meaning of the parties, therefore, was that the sum to be recovered should be only such sum as, if not agreed upon in the first instance between the committee and the suffering member, should be decided by arbitration, and no other, should be the sum to be recovered, appears to me to be clear beyond all possibility of controversy. And if that was their meaning, the circumstance that they have not

stated that meaning in the clearest terms, or in the most artistic form, is a matter utterly immaterial. What the Court below had to do was to ascertain what was the meaning of the parties, as deduced from the language they have used."

The intention of the parties, as deducible from the contract, in his opinion was, "that the right of action should be not for what a jury should say was the amount of the loss, but for what the persons designated in that particular form of agreement should so say." Although the judges responding to the lords differed in opinion, there does not appear to have been any dissent from the judgment in the House of Lords by those taking part in the decision. Braunstein *v.* Accidental Death Ins. Co., *supra;* Tredman *v.* Holman, 1 Hurls. & Colt. 72, followed Scott *v.* Avery. In Braunstein's case the policy did not, in terms, declare that the award of arbitrators should be a condition precedent to the bringing of an action. The condition was to the effect that, in case of difference of opinion as to the amount of compensation, the question should be referred to arbitration, and the award made should be taken as a full settlement of the question, and the legal effect was to prohibit an action until the amount was determined by the award. The Court held that the parties had used sufficient words to make the reference to arbitration a condition precedent. The defendant has, in substance, covenanted to pay additional toll at such rate as should be established by the parties, or, in case of their disagreement, by arbitrators to be selected for that purpose, and neither party has agreed to acquiesce in a rate of toll to be established by any other tribunal. As before suggested, while the arbitrators are not required, in terms, to halve the sum estimated as the reduction in the cost of transportation, produced solely by the enlargement of the canal, and in form award the quotient to be the additional rate of toll thereafter to be charged, it is declared and agreed that they shall ascertain and determine the reduction of the cost thus produced, and that one half of the reduction thus ascertained shall be the additional toll. In substance, therefore, the arbitrators are to establish the toll, *Id certum est quod certum reddi potest.* Every essential fact was to be settled by arbitration in case of a difference of opinion, and the award of the arbitrators would have been a substantial establishment of the additional rate of toll, and such was clearly the intent and meaning of the parties. It is the toll which should be established in this particular manner and none other that the plaintiffs are authorized to charge and collect either by distress or action; and this, and this only, is the toll which the defendant has undertaken to pay. The boats

of the defendant could not be detained or its coal seized for the collection of the toll, without the amount was established—that is, ascertained and made certain. Penn. Coal Co. *v.* Del. & Hudson Canal Co., 40 N. Y. 72. The defendant could not be put in default for non-payment of the toll until, in like manner, the amount payable was ascertained and established, and no action is maintainable until after default. When the right to the additional toll became perfect the plaintiffs had the right of distress or a right of action. The remedies were concurrent, and under the agreement the right was not perfect until the rate was established. The defendant had not agreed to pay a reasonable toll. Had that been the contract, a right of action might accrue, although the right of distress might not exist for want of certainty as to the amount payable. But the parties did not intend to leave the amount uncertain, and have agreed in what manner and by whom the amount should be determined, and the intent is clearly manifested from the terms used, and the construction of the contract to make the award a condition precedent to the right of action for the additional toll. This is an especially reasonable provision in this contract, as before suggested. And again, the defendant was not bound to send a ton of coal over the plaintiffs' canal, and it was right and proper therefore that the toll to be exacted and collected should be known, even in advance of its actual imposition, that they might elect whether to send coal to market by that route. Hudson Canal Co. *v.* Penn. Coal Co., 8 Wallace, 276.

The judgment must be reversed and a new trial granted, costs to abide event.

All concur, PECKHAM, J., not sitting.

GROVER, J., concurs on the second ground, without expressing an opinion on the ground first considered by ALLEN, J.

Judgment reversed.

(*b*) *Conditions implied in law.*

PORDAGE *v.* COLE.

IN THE KING'S BENCH, MICHAELMAS TERM, 1607.

[*Reported in* 1 *Saunders* 319.]

DEBT upon a specialty for £774 15*s*. The plaintiff declares that the defendant, by his certain writing of agreement made at, etc., by the plaintiff by the name, etc., and the defendant by the name, etc., and brings the deed into court, etc., it was agreed between the plaintiff and defendant in manner and form

following—viz., that the defendant should give to the plaintiff the sum of £775 for all his lands, with a house called Ashmole House thereunto belonging, with the brewing vessels remaining in the said house, and with the malt-mill and wheelbarrow; and that, in pursuance of the said agreement, the defendant had given to the plaintiff 5*s*. as an earnest; and it was by the said writing further agreed between the plaintiff and defendant, that the defendant should pay to the plaintiff the residue of the said sum of £775 a week after the feast of St. John the Baptist then next following (all other movables, with the corn upon the ground, except). And although the defendant has paid 5*s*., parcel, etc., yet the said defendant, although often requested, has not paid the residue to the damage, etc. The defendant prays oyer of the specialty, which is entered *in hæc verba*, to wit: "May 11th, 1668. It is agreed between Dr. John Pordage and Bassett Cole, Esq., that the said Bassett Cole shall give unto the said doctor £775 for all his lands, with Ashmole House thereunto belonging, with the brewing-vessels as they are now remaining in the said house, and with the malt-mill and wheelbarrow. In witness whereof we do put our hands and seals, mutually given as earnest in performance of this 5*s*., the money to be paid before midsummer, 1668; all other movables, with the corn upon the ground excepted." And upon oyer thereof the defendant demurs. And Withins, of counsel with the defendant, took several exceptions to the declaration. The great exception was that the plaintiff in his declaration has not averred that he had conveyed the lands, or at least tendered a conveyance of them; for the defendant has no remedy to obtain the lands, and therefore the plaintiff ought to have conveyed them, or tendered a conveyance of them, before he brought his action for the money.[1] And it was argued by Withins, that if by one single deed two things are to be performed—namely, one by the plaintiff and the other by the defendant, if there be no mutual remedy, the plaintiff ought to aver performance of his part; Trin. 12 Jac. 1 between Holden *v.* Taylor,[2] Ughtred's Case,[3] and Sir Richard Pool's case there cited, and Gray's Case;[4] and that the word (*pro*) made a condition in things executory.[5] And here in this case it is a condition precedent which ought to be performed before the action brought, wherefore he prayed judgment for the defendant.

But it was adjudged by the Court, that the action was well brought without an averment of the conveyance of the land;

[1] Only so much of the case is given as relates to this exception.—Ed.
[2] 1 Roll. Abr. 518 (C.), pl. 2–3.
[3] 7 Rep. 10.
[4] 5 Rep. 78–79; S. C. Cro. Eliz. 405.
[5] Co. Litt. 204*a*.

because it shall be intended that both parties have sealed the specialty. And if the plaintiff has not conveyed the land to the defendant, he has also an action of covenant against the plaintiff upon the agreement contained in the deed, which amounts to a covenant on the part of the plaintiff to convey the land; and so each party has mutual remedy against the other. But it might be otherwise if the specialty had been the words of the defendant only, and not the words of both parties by way of agreement as it is here. And by the conclusion of the deed it is said that both parties had sealed it, and therefore judgment was given for the plaintiff, which was afterward affirmed in the Exchequer Chamber, Trin. 22 of King Charles the Second.

KINGSTON *v.* PRESTON.

IN THE KING'S BENCH, EASTER TERM, 1773.

[*Cited in Douglas* 688.]

ACTION of debt, for non-performance of covenants contained in certain articles of agreement between the plaintiff and the defendant. The declaration stated: "That, by articles made March 24th, 1770, the plaintiff, for the considerations thereinafter mentioned, covenanted with the defendant to serve him for one year and a quarter next ensuing, as a covenant-servant, in his trade of a silk-mercer, at £200 a year, and in consideration of the premises, the defendant covenanted, that at the end of the year and a quarter, he would give up his business of a mercer to the plaintiff, and a nephew of the defendant, or some other person to be nominated by the defendant, and give up to them his stock in trade, at a fair valuation; and that between the young traders deeds of partnership should be executed for fourteen years, and from and immediately after the execution of the said deeds, the defendant would permit the said young traders to carry on the said business in the defendant's house. Then the declaration stated a covenant by the plaintiff, that he would accept the business and stock in trade, at a fair valuation, with the defendant's nephew, or such other person, etc., and execute such deeds of partnership, and, further, that the plaintiff should, and would, at, and before, the sealing and delivery of the deeds, cause and procure good and sufficient security to be given to the defendant, to be approved of by the defendant, for the payment of £250 monthly to the defendant, in lieu of a moiety of the monthly

produce of the stock in trade, until the value of the stock should be reduced to £4000. Then the plaintiff averred that he had performed, and been ready to perform, his covenants, and assigned for breach, on the part of the defendant, that he had refused to surrender and give up his business, at the end of the said year and a quarter. The defendant pleaded, first, that the plaintiff did not offer sufficient security ; and, second, that he did not give sufficient security for the payment of the £250, etc. And the plaintiff demurred generally to both pleas. On the part of the plaintiff, the case was argued by Mr. Buller, who contended that the covenants were mutual and independent, and, therefore, a plea of the breach of one of the covenants to be performed by the plaintiff was no bar to an action for a breach by the defendant of one of which he had bound himself to perform, but that the defendant might have his remedy for the breach by the plaintiff, in a separate action. On the other side, Mr. Grose insisted that the covenants were dependent in their nature, and, therefore, performance must be alleged. The security to be given for the money was manifestly the chief object of the transaction, and it would be highly unreasonable to construe the agreement so as to oblige the defendant to give up a beneficial business, and valuable stock in trade, and trust to the plaintiff's personal security (who might, and indeed was admitted to be worth nothing) for the performance of his part. In delivering the judgment of the Court, Lord Mansfield expressed himself to the following effect : There are three kinds of covenants : First, such as are called mutual and independent, where either party may recover damages from the other, for the injury he may have received by a breach of the covenants in his favor, and where it is no excuse for the defendant to allege a breach of the covenants on the part of the plaintiff ; second, there are covenants which are conditions and dependent, in which the performance of one depends on the prior performance of another, and, therefore, till this prior condition is performed the other party is not liable to an action on his covenant ; third, there is also a third sort of covenants, which are mutual conditions to be performed at the same time ; and in these, if one party was ready, and offered, to perform his part, and the other neglected, or refused, to perform his, he who was ready, and offered, has fulfilled his engagement, and may maintain an action for the default of the other ; though it is not certain that either is obliged to do the first act. His lordship then proceeded to say that the dependence or independence of covenants was to be collected from the evident sense and meaning of the parties, and that however trans-

posed they might be in the deed, their precedency must depend on the order of time in which the intent of the transaction requires their performance. That in the case before the Court it would be the greatest injustice if the plaintiff should prevail. The essence of the agreement was, that the defendant should not trust to the personal security of the plaintiff, but, before he delivered up his stock and business, should have good security for the payment of the money. The giving such security, therefore, must necessarily be a condition precedent. Judgment was accordingly given for the defendant, because the part to be performed by the plaintiff was clearly a condition precedent."

MORTON *v.* LAMB.

IN THE KING'S BENCH, FEBRUARY 1, 1797.

[*Reported in* 7 *Term Reports* 121.]

IN an action on the case the plaintiff declared against the defendant for that, whereas on February 10th, 1796, at Manchester, in the county of Lancaster, in consideration that the plaintiff, at the special instance and request of the defendant, had then and there bought of the defendant 200 quarters of wheat at £50 0*s.* 6*d.* per quarter, such price to be therefore paid by the plaintiff to the defendant, he, the defendant, undertook and then and there promised the plaintiff to deliver the said corn to him (the plaintiff) at Shardlow, in the county of Derby, in one month from that time, viz., of the sale; and then he alleged that although he (the plaintiff) always from the time of making such sale for the space of one month then next following and afterward was ready and willing to receive the said corn at Shardlow, yet the defendant not regarding his said promise, etc., did not in one month from the time of the making of such sale as aforesaid, or at any other time deliver the said corn to the plaintiff at Shardlow or elsewhere, although he (the defendant) was often requested so to do, etc. The defendant pleaded the general issue, and at the trial the plaintiff recovered a verdict.

Holroyd obtained, in the last Term, a rule calling on the plaintiff to show cause why the judgment should not be arrested, because it was not averred that the plaintiff had tendered to the defendant the price of the corn, or was ready to have paid for it on delivery.

Law, *Wood*, and *Scarlett* now showed cause.

Holroyd contra.

Lord KENYON, C.J. If this question depended on the technical niceties of pleading, I should not feel so much confidence as I do; but it depends altogether on the true construction of this agreement. The defendant agreed with the plaintiff for a certain quantity of corn, to be delivered at Shardlow within a certain time; and there can be no doubt but that the parties intended that the payment should be made at the time of the delivery. It is not imputed to the defendant that he did not carry the corn to Shardlow, but that he did not deliver it to the plaintiff; to this declaration the defendant objects, and says: "I did not deliver the corn to you (the plaintiff), because you do not say that you were ready to pay for it; and if you were not ready, I am not bound to deliver the corn;" and the question is, whether that should or should not have been alleged. The case decided by Lord Holt in Salk. 112, if indeed so plain a case wanted that authority to support it, shows that where two concurrent acts are to be done, the party who sues the other for non-performance must aver that he had performed, or was ready to perform, his part of the contract. Then the plaintiff in this case cannot impute to the defendant the non-delivery of the corn, without alleging that he was ready to pay the price of it. A plaintiff, who comes into a court of justice must show that he is in a condition to maintain his action. But it has been argued that the delivery of the corn was a condition precedent, and some cases have been cited to prove it; but they do not appear to me to be applicable. In the one in Saunders,[1] the party was to pull down a wall, and was then to be paid for it; there is no doubt but that the pulling down of the wall was a condition precedent to the payment; the act was to be done, and then the price was to be paid for it. So in the case in Salk. 171, where work was to be done, and then the workman was to be paid. And in ordinary cases of this kind the work is to be done before the wages are earned; but those cases do not apply to the present, where both the acts are to be done at the same time. Speaking of conditions precedent and subsequent in other cases only leads to confusion. In the case of Campbell *v.* Jones, I thought, and still continue of that opinion, that whether covenants be or be not independent of each other must depend on the good sense of the case, and on the order in which the several things are to be done; but here both things, the delivery of the corn by one, and the payment by the other, were to be done at the same time; and as the

[1] 2 Saund. 350.

plaintiff has not averred that he was ready to pay for the corn, he cannot maintain this action against the defendant for not delivering it.

LAWRENCE, J. It has been argued, on behalf of the plaintiff, that this must be considered as a declaration on mutual promises, and that as this is a demand on the defendant on the ground of some mutual promise made by him, and which was the consideration of the plaintiff's promise, it was not necessary to aver performance on his part ; but if so, the declaration is not adapted to the truth of the case, in not stating that the defendant's promise was in consideration of the plaintiff's. But on this declaration I can only consider it as an agreement by the defendant to deliver the corn at Shardlow on being paid for it. The payment of the money was to be an act concurrent with the delivery ; and then the case is like that of Callonel *v.* Briggs, which was on an agreement to pay so much money six months after the bargain, the plaintiff transferring stock ; and there Lord Holt said : " If either party would sue upon this agreement, the plaintiff for not paying, or the defendant for not transferring, the one must aver and prove a transfer or a tender ;" he did not say that the not doing it should come from the defendant by way of excuse, but that the doing it must be alleged in the declaration ; and that affords an answer to great part of the argument urged on behalf of the defendant in this case. The tendering of the money by the plaintiff makes part of the plaintiff's title to recover, and he must set out the whole of his title. The strongest case cited for the defendant was that of Merrit *v.* Rane ;[1] but that does not appear to me of sufficient weight to overturn the authority of the case of Callonel *v.* Briggs. I do not quite understand what the Court there said, that it was not necessary to allege a tender, for that it should have come from the defendant by way of excuse ; for as it was stated that the plaintiff's agent was ready to receive a transfer of the stock, but that the defendant did not attend, it would have been absurd to state a tender of the money to a person who was not present to receive it. There is, however, another case, not referred to in the argument, Lea *v.* Exelby,[2] which is an authority to show that the plaintiff in this case should have averred a tender. There the plaintiff declared that in consideration that he had promised to pay the defendant (who was possessed of a lease for years, the inheritance of which was in the plaintiff) a certain sum on such a day, the defendant promised on payment to surrender to him the lease ; and that he had tendered the money at the time, but

[1] 1 Stra. 458. [2] Cro. Eliz. 888.

that the defendant had not surrendered ; and on motion in arrest of judgment, because it was not alleged that the defendant refused as well as that the plaintiff tendered, the Court held that the declaration was bad for that reason. Therefore, on the authority of that case, and of that of Callonel *v.* Briggs, I am of opinion that the declaration cannot be supported, and that the judgment must be arrested.

Rule absolute.[1]

GLAZEBROOK, Clerk, *v.* WOODROW, Clerk.

In the King's Bench, November 19, 1799.

[*Reported in* 8 *Term Reports* 366.]

In covenant the declaration stated that by articles of agreement under seal made on March 10th, 1796, between the plaintiff and the defendant (after reciting that the plaintiff had established a grammar-school at Warrington in which he had many scholars, and for the purpose of conducting the said school with convenience had possessed himself of a piece of ground on which he had erected a building appropriated to instruction, etc., and being about to leave Warrington had agreed with the defendant to sell to him not only his right, title, and interest in the said ground and building, subject to a yearly ground rent of 16*s.* and 6*d.*, payable to J. Blackburne in fee, but to surrender to him the pupils he then had under his care so far as in him lay, together with all benefit arising therefrom, for the considerations thereinafter mentioned), the plaintiff covenanted and agreed to and with the defendant that he, the plaintiff, would on or before August 1st, 1797, convey to the defendant, his heirs, etc., the said ground with the buildings thereon erected, subject as aforesaid, and the fixtures therein, for all the plaintiff's right, title, and interest in the premises, and would on or before June 24th, 1796, surrender up the use and enjoyment of the said premises and deliver over as far as in him lay all the pupils he might then happen to have under his care to the care of the defendant, and all the profits arising from them, and also that he, the plaintiff, would in the meantime use his utmost endeavors with the parents and guardians of the children committed or to be committed to his care in Warrington, to induce them to continue their children under the care and tuition of the defendant, etc., and in consideration thereof the

[1] The concurring opinion of Grose, J., has been omitted.—Ed.

defendant covenanted and agreed to and with the plaintiff that the defendant, his executors, etc., would on or before the said August 1st, 1797, pay the plaintiff, his executors, etc., the sum of £120 with lawful interest from January 1st next preceding the said August 1st. The plaintiff then averred that in pursuance of the said articles he afterward, viz., on the said June 24th, 1796, surrendered up the use and enjoyment of the said ground with the buildings, etc., to the defendant, who thereupon entered upon and became and was and from thence hitherto had been and still is thereof possessed, and also then delivered over as far as in him lay all the pupils he then had under his care and all the profits, etc.; and although the plaintiff had well and truly performed everything else in the said articles contained on his part, yet protesting that the defendant had not performed anything in the said articles contained on his part, the plaintiff averred that the defendant did not on the said August 1st, 1797, or at any other time before or since, pay the said £120 with interest, etc., to the plaintiff, but wholly refused to pay the same, etc., wherefore, etc.

To this the defendant pleaded: first, that from the time of making the said articles until and on August 1st, 1797, he (the defendant) was ready to accept a conveyance of the said ground in the declaration mentioned with the buildings, etc., for and during all the plaintiff's right, title, and interest in the same, and at the same time to pay the said £120 in the declaration mentioned with interest, etc., if the plaintiff would have made or procured any such conveyance or assurance, yet that the plaintiff did not on or before the said August 1st, 1797, or at any time since, convey to the defendant the said ground with the buildings, etc., for and during all the plaintiff's right, etc., wherefore the defendant had not paid to the plaintiff the said £120, etc. There was a second plea to the like effect; stating that the plaintiff had not tendered any conveyance of the premises, etc.

To these pleas there was a general demurrer, and joinder in demurrer.

Yates in support of the demurrer.

Wood contra.

Lord KENYON, C.J. The cases which have been mentioned are in my recollection; and although I have not the least doubt what the sense and justice of this case require to be done, yet if I found that I should thereby transgress any technical rule of law which had been established, I would not set up my opinion against the wisdom of those who are gone before me. But I am fully satisfied that what justice requires to be done in this

case will not contravene any principle of law which has been established in those cases. The general rule which governs them all, is that every man's agreement is to be performed according to his intent, as far as that is to be collected from the particular instrument. Now here the case is that the plaintiff, being in possession of a school, covenanted with the defendant to convey to him the good will of it (if I may use the expression) and the building itself on or before August 1st, 1797, and in the meantime he consented to put him in possession of the premises on some prior day ; on the other hand, the defendant engaged to pay him a stipulated price in consideration of all that the other had undertaken to do on or before the same August 1st. And now the plaintiff who is to execute the conveyance, and who is also the person to pay for it, not having made it, or made a tender of it to the defendant, nevertheless calls upon him by this action to pay the consideration-money. The very statement of such a claim is enough to refute it. If these be not dependent covenants, it is difficult to conceive what covenants are so. The very substance of the consideration to entitle the plaintiff to receive the money was the making of the conveyance required ; and it is admitted that he has not done it ; that makes an end of the question. The case of Campbell *v.* Jones was very different from the present ; for there the instruction to be given was not to be, and could not in the nature of the thing be performed at the same time with the payment of the money by the defendant, for which a certain time was limited ; whereas no time was limited for giving the instruction. But here the parties have stipulated for the conveyance and the payment to be performed at the same time. And if we were to hold otherwise in such a case as the present, the greatest injustice might be done ; for, supposing, in the instance of a trader who had entered into such a contract for the sale of an estate, that between the making of the contract and the final execution of it he were to become a bankrupt, the vendee might be in the situation of having had payment enforced from him, and yet be disabled from procuring the property for which he had paid. The injustice of such a procedure is too manifest to be insisted upon further.

GROSE, J. The question is whether these covenants be dependent or independent ; and that must be collected from the apparent intention of the parties to the contract. There is certainly some confusion in the books on this subject, some of the older cases leaning to construe covenants of this sort to be independent, contrary to the real sense of the parties and the true justice of the case. But the later authorities convey more

just sentiments ; and the case of Kingston *v.* Preston[1] was the first strong authority in which they prevailed in opposition to the former. Nothing indeed could exhibit the doctrine which ought to prevail in these instances in a stronger point of view than the circumstances of that case ; for there, if the plaintiff had prevailed, the most flagrant injustice would have been committed. The fact was that the defendant, being possessed of a very large stock in trade, covenanted with the plaintiff to assign the same to him and another person at the end of a twelvemonth at a fair valuation, when deeds of partnership were to be executed between the two last persons, and the plaintiff covenanted that he would at and before the sealing and delivery of the deeds procure good and sufficient security to be given to the defendant and to be approved of by him for the payment of a certain stipulated sum by monthly instalments ; and there the attempt was by the plaintiff to get possession of the whole stock in trade of the defendant to a great amount, without giving him any security at all, to his inevitable ruin. But the absurdity and injustice of the thing struck the Court so forcibly that they said it could never have been the intention of the parties that the defendant should surrender his whole fortune into the plaintiff's hands without the previous security which he had insisted upon, and that he should solely rely upon his remedy by action for the breach of the plaintiff's covenant ; they therefore gave judgment for the defendant. I have since found that that was not the first case where those sentiments began to be entertained ; for it appears from a late publication of Reports from the manuscripts of Lord Willes, C.J., that in a case of Thomas *v.* Cadwallader[2] his lordship noticed the injurious tendency of the doctrine which had before that time prevailed in these cases ; and seemed very desirous that the governing rule should be so to construe such covenants as that the real intention of the parties should be carried into effect, to attain the true justice of the case. This was afterward done in the case of Kingston *v.* Preston ; and that has since been settled to be the rule in many cases. Now here the plaintiff covenanted to convey on or before August 1st, 1797, though the defendant was to be put in possession before. And the reason why the conveyance was not to be executed before is obvious ; because that was the day on which the money was to be paid. Then what is the true justice of this case and the evident meaning of the parties? It is plainly this, that the execution of the conveyance and the payment of the money should be concurrent acts, and even the payment of the interest

[1] Cited at large in Jones *v.* Barkley, Dougl. 689. [2] Willes's Rep. 496.

was to be deferred till August 1st, though it was to run from January 1st preceding. Then there is an end of the question ; because it is not pretended that the plaintiff had conveyed or was ready to convey at the time. How far the determination in Boone *v.* Eyre militates against the principles I have laid down may be a matter of doubt ; but the intention of the parties is or is assumed to be the governing principle of all the late determinations.

LAWRENCE, J. The plaintiff's case is attempted to be maintained on the supposed intention of the parties and on authorities. First, on the intention of the parties, it is said that where one promises to another to perform a certain thing in consideration of several matters to be performed by himself, he is entitled to maintain an action against that other for non-performance of his engagement, if he himself has performed any one of the things stipulated by him to be done. Therefore that in this instance the plaintiff, who has covenanted to put the defendant in possession and to convey the premises to him in consideration of a certain sum, is entitled upon performance of one of those things, to maintain his action for the consideration-money. But it is clear that if the agreement appear to be that the whole of what the plaintiff engaged for was to be done before the money was to be paid, it will not follow that, because a part only has been performed, he can recover the money, and leave the defendant to his remedy upon the agreement for the breach of the other part. For whether one promise be the consideration of another, or whether the performance and not the mere promise be the consideration, must be gathered from, and depends entirely upon, the words and nature of the agreement. Now suppose the terms of the agreement had been that the plaintiff was to put the defendant in possession of and to convey the premises to him on or before August 1st, and that upon the defendant's being put in possession and the conveyance made to him he was to pay the purchase-money on or before that day ; there could be no doubt but that the conveyance must be made as well as the possession delivered up before any right to the purchase-money would accrue. Whatever the form of the words may be, if we can collect from the face of the instrument that the whole was to be performed by the plaintiff before the money was to be paid, nothing short of performance of the whole can enable him to sustain this action for the money. But authorities have been cited to show that, where a certain time is fixed for the payment of money in consideration of certain acts stipulated to be done, a partial performance of such acts is sufficient to found an action for the money ; but

the cases cited do not warrant so general a conclusion. Part execution is only a circumstance from whence the intention of the parties is to be collected ; but nothing is to be inferred from it in favor of the plaintiff in this case ; for though the defendant was to be put in possession in June, 1796, and the money was to be paid in August, 1797, yet as that also was the time fixed for the execution of the conveyance, it is plain that the defendant did not intend to part with his money till his title was secure. In the case of Boone *v.* Eyre,[1] the plaintiff had sold to the defendant an estate in Dominica, with the negroes, under the usual covenants for a good title and quiet enjoyment and further assurances, in consideration of a sum in gross and a certain annuity for lives, which the defendant covenanted to pay, " he, the plaintiff, well and truly performing all and singular the covenants, clauses, recitals, and agreements in the said indenture of sale contained ;" and in bar to an action of covenant for the arrears of the annuity, besides assigning breaches of specific and partial covenants, the defendant by his fourth plea pleaded " that the plaintiff at the time of making the said indenture had not in himself full power, true title, and good and lawful authority to bargain, sell, and release the said plantation, and negroes, etc., in manner and form as in the said indenture mentioned." The Court said it would be strange if such a defence were to be allowed, when if any one negro on the plantation were proved not to have been the property of the plaintiff, it would bar his action for the annuity. The judgment of the Court there went on the ground that, in the form the breaches were assigned the plea did not necessarily go to the whole of the consideration. But if the plea had been that the plaintiff had no title at all to the plantation itself I do not know that it would not have been holden sufficient. So in Campbell *v.* Jones, the defendant against whom the action was maintained had the whole of what was to be conveyed to him ; and the substantial part of the consideration was the right of using the method of bleaching described in the patent ; though, in addition to that, the plaintiff had also engaged to instruct him in the use of that method ; the not doing of which might be recompensed in damages. That instruction might consistently with the plaintiff's covenant as well be given after as before the time specified for the payment of the money, and, therefore, it was not necessary to be averred in

[1] This was cited from the case reported in 1 H. Black. 273, note *a*, and also from a MS. note which is referred to by Lord Kenyon in giving judgment in Campbell *v.* Jones, *ante*, Vol. VI. 573, and not from the case reported by Blackstone, J., Vol. II. 1312.

an action to recover the money. Therefore neither upon the reason of the thing nor the authorities is the plaintiff entitled to recover.

Judgment for the defendant.[1]

RAWSON AND OTHERS *v.* JOHNSON.

IN THE KING'S BENCH, JANUARY 31, 1801.

[*Reported in* 1 *East* 203.]

THIS was an action on the case, to recover damages for the breach of a contract, whereby the defendant undertook to sell and deliver to the plaintiffs a certain quantity of malt at a given price. This was laid differently in different counts, and at the trial at the last Assizes at York, the plaintiff obtained a verdict, which was entered generally on all the counts. The first two counts, in which was averred a part delivery of the malt, were admitted to be good ; but a rule was obtained calling on the plaintiffs to show cause why the judgment should not be arrested for the defect of the third count, in only averring a readiness and willingness in the plaintiffs to pay for the malt, and not averring the actual tender of the price agreed upon. The count in question was as follows :

And whereas also afterward, to wit, on November 12th, 1799, to wit, at Leeds in the county of York, in consideration that the plaintiffs, at the instance and request of the defendant, had then and there bought of the defendant a certain large quantity, to wit, 100 quarters of malt, at and for a certain price then and there agreed upon between them, he, the defendant, undertook and then and there faithfully promised the plaintiffs well and truly to deliver to them the said 100 quarters of malt whenever he, the defendant, should be thereunto afterward requested ; and the plaintiffs in fact say, that although the defendant afterward, to wit, on, etc., at, etc., requested the defendant to deliver to them the said last-mentioned 100 quarters of malt, and were then and there ready and willing to pay the said defendant for the same, according to the terms of the said sale, and although the plaintiffs were then and there ready and willing and offered to accept and receive the said last-mentioned 100 quarters of malt of and from the said defendant, yet the defendant, not regarding his said last-mentioned promise, etc., did not, when he was requested as aforesaid, or at any

[1] The concurring opinion of Le Blanc, J., has been omitted.—ED.

other time before or since, deliver to the plaintiffs the said last-mentioned 100 quarters of malt, or any part thereof, but had hitherto wholly refused and still does refuse, whereby, etc.

Law and *Lambe* showed cause against the rule.

Holroyd contra.

Lord KENYON, C.J. However technical rules are to be attended to, and in some cases cannot be dispensed with, yet in administering justice we must not lose sight of common sense, and the common sense of this case will not be found to militate against any rule of law. No doubt can be entertained how this case should be decided ; one man agrees to do a certain act in consideration of another man doing another act ; the acts are to be done at the same time and place ; one of the parties goes there intending to do his part, and the other stays away altogether ; the former is obliged to bring his action for this breach of the agreement, and he pleads according to the truth of the fact, that he was at the time and place appointed ready to have received the other's goods and to have paid the stipulated price for them, which is all that he was bound to do, and that nobody was there on the part of the defendant, or that the goods were not there ready to be delivered ; would it be any answer to say that he ought to have pleaded a tender of the money ? Now this case is the same in effect : the defendant undertook to deliver the malt when he should be requested, and the plaintiffs plead that they made the request to him, and were ready and willing to have accepted and paid for it, but that he did not deliver it when requested, or at any other time, but refused so to do. To be sure under this averment the plaintiffs must have proved that they were prepared to tender and pay the money if the defendant had been ready to have received it and to have delivered the goods ; but it cannot be necessary in order to entitle them to maintain their action that they should have gone through the useless ceremony of laying the money down in order to take it up again. It would be repugnant to common sense to require it. It is reported in the case of Morton *v.* Lamb, that I said that the plaintiff should have averred a performance or a readiness to perform his part of the contract ; I do not doubt that I said so, and I still think it was rightly said ; and if so it would decide this case. However, if it were necessary I see no reason why we should not avail ourselves of another argument urged at the bar, namely, that this is after verdict, when everything may be presumed to have been proved which was necessary to sustain the declaration. It is true that a verdict will not cure a defective case, but it will cure a case defectively stated.

LAWRENCE, J. The rule in this case was moved for on the authority of Morton *v.* Lamb ; the ground of that determination was, that where a man had agreed for a certain price to deliver corn to another at a certain place within a month, the payment of the money and the delivery of the corn were concurrent acts to be performed at the same time ; and that it was not sufficient to enable the plaintiff to maintain an action for damages for the non-delivery of the corn to aver merely that he was ready and willing to receive it. But the Court did not hold it necessary in such a case that the plaintiff should part with his money into the other's hands, and then endeavor to get the corn as he could. I alluded there to some cases in order to show that the plaintiff must state in his declaration that he was ready to do everything that was required on his part to be done ; but I did not mean to say, nor was the attention of the Court called to it, that that averment was to be made in any particular form. In the case before the Court there was no averment whatever of the kind. It is urged that this is after verdict, and that it is sufficient that there is an allegation of the fact of a readiness to do that which was required of the plaintiff ; and to be sure if it were necessary to resort to that, so much strictness in the manner of pleading a fact is not necessary after verdict as on demurrer. But since this rule was obtained I have looked more particularly into the precedents to see in what manner averments of this sort have been made ; and I have found one in particular in Plowd. 180, on which probably the pleader who drew this declaration had his eye. The case is that of Norwood *v.* Norwood and Read, executors of Gray ; wherein the plaintiff declares that in consideration that he had paid the testator in his lifetime 40*s.* he promised to deliver to the plaintiff at Ramsgate 60 quarters of wheat in certain proportions and for a given price to be paid immediately after the delivery of the same. The declaration then avers that Gray, though often requested to deliver the corn, and though the plaintiff at the several times aforesaid when the wheat should have been delivered was ready at Ramsgate to receive it, and to pay to Gray the several sums which he ought to pay immediately after the said receipts of the wheat, had not delivered, but the same to deliver to the plaintiff had wholly refused, etc. And upon demurrer the plaintiff had judgment. There, indeed, the only question made was, how far the executors were liable ? but it was never questioned but that supposing they were liable the form of the declaration was good. There are similar precedents to be found in Hearne's Pleader, 131, and in Clift, 97. It appears, therefore, upon the

whole, that this form of declaration agrees with the current of authorities ; that it is not impeached by the case of Morton v. Lamb, on the authority of which the question was brought forward, and that it is warranted by the precedents I have quoted.

Le Blanc, J. According to the cases which have been determined on this question neither of the parties was bound to do the first act or to perform his part of the agreement before the other. If so, then neither can be bound to state that in pleading which is equivalent to performance. Now, a tender and refusal has always been deemed to be equivalent to performance ; therefore, as performance in this case was not necessary, neither was it necessary to aver that which was equivalent to it. But all that is required of the plaintiffs to show is, that they did everything which they were bound in fact to do. Then, if they show that they were ready to pay the price provided the defendant were ready to deliver the malt, that is all that was necessary for them to do, and consequently their pleading a readiness to perform is equivalent to everything that they were bound to perform where the defendant refused to perform his part. Therefore, I consider this averment sufficient ; and that it must be taken after verdict that they had the money ready to have paid it if the defendant had been ready to perform his part.

Rule discharged.[1]

MARSDEN v. MOORE & DAY.

In the Exchequer, May 2, 1859.

[*Reported in* 4 *Hurlstone and Norman* 500]

Declaration. That the plaintiff agreed with the defendants to sell to them one-fourth part or share in a mining sett situate and known by the name of Osom's Hill for the sum of £250 ; and the defendants agreed with the plaintiff to purchase of him the said one-fourth part or share in the said mining sett at the price aforesaid ; and it was further agreed that the plaintiff and defendants should form a company, with a capital of £20,000, for working the mining sett, etc. ; and as soon as the company should be registered, with limited liability, the defendants would pay to the plaintiff £250. Averment : that all conditions precedent, matters, and things requiring to have been performed and to have happened and existed, to entitle the plaintiff to the performance of the defendants' said agreement,

[1] The concurring opinion of Grose, J., has been omitted —Ed.

and to maintain this action for the non-performance thereof, were performed and did happen and exist before the commencement of this suit: yet the defendants did not pay the said sum of £250 or any part thereof.

Second plea, by defendant Day. That the agreement was an agreement in writing signed by the defendants, as follows: "Memorandum of agreement entered between W. Marsden of the first part, and Paul Moore and Edward Day of the second part. W. Marsden has agreed to sell to Paul Moore and Edward Day one-fourth part or share in a mining sett situate and known by the name of Osom's Hill in the parish of Grindon, in Staffordshire, for the sum of £250, and Paul Moore and Edward Day agree to purchase at that price: and it is further agreed between the parties that they will forthwith form a company, under the Limited Liability Act, with a capital of £20,000, for working or developing the said mining sett, with such rules and regulations as the promoters shall afterward agree and determine; and as soon as the company is registered, with limited liability, we, P. Moore and E. Day, will pay to W. Marsden the sum of £250 as hereinbefore stated." Averment: that the plaintiff had not at the time of making the agreement, nor had he at any time afterward, nor had he now, any title to the said one-fourth part or share in the said mining sett in the declaration mentioned, nor any right or title to convey the same.

Third plea. That the agreement in the declaration mentioned was that set forth in the second plea; and that, according to the agreement, the plaintiff ought, before being entitled to call on the defendants for payment of the sum of £250 or any part thereof, to have been ready and willing to convey the said one-fourth part or share in the mining sett. But the plaintiff never has been at any time ready and willing to convey the same to the defendants according to the said agreement.

Similar pleas were pleaded by the defendant Moore.

Demurrers and joinders.

Karslake in support of the demurrers.

Gray for defendant Day.

Field for defendant Moore.

POLLOCK, C.B. We are all of opinion that the pleas are good, and that the defendants are entitled to judgment. The question is, what did the parties mean by the agreement declared on, whether each party is entitled to insist on performance by the other, without reference to his capacity to perform his own part of the agreement. The plea sets out an agreement by which, "as soon as the company is registered, with

limited liability," the defendants agree to pay to the plaintiff the sum of £250 "as thereinbefore stated;" that is, as the purchase of a mining sett. I do not think that the reference to the uncertain period depending upon the registration of the company brings the case within the rule laid down in Pordage *v.* Cole, 1 Saund. 319. It is essential to a contract of buying and selling that one shall pay, the other to sell or convey. On that ground this case is distinguishable from Pordage *v.* Cole. In such cases each party intends that the other shall perform his part, and not to rely on a right of action. Therefore, in the present case, the plaintiff is not in a condition to maintain the action.

BRAMWELL, B. I am of the same opinion. In the case of Pordage *v.* Cole, the Court construed the agreement as if it appeared on the face of it that there was no intention that the conveyance should take place on the day appointed for payment of the money. Assuming that to be so, the case is rightly decided; but whether I should have so construed the agreement is another matter. Here the plaintiff agrees to sell, the defendants agree to purchase; there is a clear present agreement for a future sale and payment. The subsequent part of the agreement merely postpones the time for performance; it does not alter the effect of the prior stipulation, which is, that the money is to be paid upon the conveyance. The sale and payment are to be contemporaneous. The last plea is clearly good. As to the other plea there is more difficulty. The question is, whether the defendant has sufficiently negatived the existence of such a title as would have enabled the plaintiff to convey the sett to the defendants. In the old days I think we should have said it was good in substance as an averment that there was no title.

Judgment for the defendants.[1]

GRANT *v.* JOHNSON.

IN THE COURT OF APPEALS OF NEW YORK, JULY, 1851.

[*Reported in* 5 *New York Reports* 247.]

COVENANT on articles of agreement for the sale of land, between the plaintiff (Grant) of the first part, and the defendant (Johnson) of the second part. "The party of the first part for the consideration of nine hundred and fifty dollars, to be paid

[1] The concurring opinions of Barons Martin and Channell have been omitted. – ED.

as follows, to wit, two hundred dollars on the first day of April next, two hundred dollars on the first of April, 1847, the remainder in two annual payments of equal amount, to be paid on the first of April of the two succeeding years, together with interest from the first of April next, agrees to sell to the party of the second part, a certain piece of land lying in the town of Neversink" (describing it). "And the party of the first part agrees to give to the party of the second part the quiet and peaceable possession of said premises on the first of November next, with the exception of certain privileges granted to Nicholas Wakeley, and certain other privileges granted to Teunis Misener," etc. "And the said party of the first part further agrees to give to the said party of the second part a good and sufficient deed for the same on the first of May next, if the above conditions are complied with."

The agreement contained a further stipulation, which it is unnecessary to mention, and was executed under the hands and seals of the parties on August 24th, 1845.

The declaration assigned as a breach the non-payment of the second instalment of $200, payable on April 1st, 1847; but it contained no averment of the tender of a deed of the premises, before, on, or subsequent to May 1st, 1846, or a readiness or willingness to execute one, in accordance with the covenant of the plaintiff.

The defendant interposed several pleas, which, as no question arose upon them, it is unnecessary to mention more particularly.

At the trial the plaintiff proved the agreement and rested. The defendant moved for a nonsuit, on the ground that the plaintiff was bound to show the delivery or tender of a deed before he could recover the second instalment.

The judge decided that the covenants were independent, and that the plaintiff could recover without showing either a delivery or tender of a deed. To this decision the defendant excepted.

It was then admitted that the defendant had received possession of the premises according to the contract, and had paid the first instalment. He then offered to prove that no deed of the premises in question had been tendered to him up to July 15th, 1846. The Court rejected the evidence as not constituting a legal defence, and the defendant excepted. The jury, under the direction of the judge, found a verdict for the plaintiff for the amount of the second instalment and interest. Upon a bill of exceptions presenting the above facts, a motion for a new trial was made before the Supreme Court in the third district, and denied. An issue of law arising upon a demurrer to the

replication of the plaintiff presenting the same question, had previously been decided by the same Court in favor of the plaintiff. The new trial was denied, and the defendant's demurrer overruled, upon the ground that the covenants were independent, and that the plaintiff could recover without averring or proving performance, or an offer to perform the covenant on his part. See 6 Barb. 337. From this decision the defendant appealed to this Court.

N. Hill, Jr., for appellant.

S. Beardsley for respondent.

GARDINER, J. The question in this case is, whether the plaintiff can sustain an action for the second instalment of the purchase-money secured by the agreement, without averring and proving the delivery, or an offer to deliver a deed of the premises.

The parties have declared that certain payments were to be made, and certain acts performed by them respectively, at the times specified in the agreement. They must be held to have intended the performance of these acts, when, and of course in the order of time indicated in their covenants. The plaintiff was to give the defendant possession on November 1st, 1845. The performance of this requirement preceded anything to be done by the defendant, and it might consequently have been enforced without any offer upon the part of the defendant; but if no possession had been given, the plaintiff could not have recovered the $200 to be paid by the vendee on April 1st, 1846.

The possession, however, was given, and the first $200 paid, and on May 1st, 1846, the vendee was entitled to his deed, as the thing next to be done in the order prescribed by the parties in their agreement. It was not executed, nor a willingness to execute it either averred or proved. The payment of the $200 for which the suit is brought was fixed upon a day subsequent to that agreed upon for the delivery of the deed. The case is therefore brought directly within the letter and spirit of the second rule suggested by Williams in his note to Pordage *v.* Cole (1 Saund. 320*b*) that "when a day is appointed for the payment of money, etc., and the day is to happen after the thing which is the consideration is to be performed, no action for the money can be sustained without averring performance."

The plaintiff relies upon the third rule of Williams in his note to the case above cited, that "where a covenant goes only to a part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained without averring performance." The rule is not free from obscurity. It was

given by Lord Mansfield originally in Boone *v.* Eyre, 1 H. Bl. 273, note *a*. The defendants in that suit, after having received a conveyance of the equity of redemption of a plantation, and the negroes upon it, when sued for a part of the consideration, set up a breach of a collateral covenant on the part of the plaintiff, relating to the title and possession of the negroes in bar of the action. The warranty extended both to the estate and negroes. 4 Mees. & Welsb. 311. The covenant of the plaintiff, it will be perceived, embraced the whole and every part of the subject conveyed. If the title failed to a single negro, or the defendant was evicted from an acre of the land, the covenant was intended to afford redress, and enable a jury to apportion the damages according to the agreement of the parties. A "breach of the plaintiff's covenant might be paid for in damages," because a failure of title as to any part of the consideration could be compensated according to the standard fixed by the parties. In other words, the consideration for the defendant's promise was divisible, and the damages arising from a breach of the covenant of warranty were apportioned to each parcel of that consideration, by the agreement itself. This, it is supposed, is what is meant by the expression above quoted, that the breach may be paid for in damages. 5 Mees. & Welsb. 701. Accordingly it is stated in the note to Pordage *v.* Cole, *supra*, that, "when the consideration for the payment of the money is entire and indivisible, so that the money payable is neither apportioned by the contract, nor capable of being apportioned by a jury, an action is not maintainable."

The doctrine is thus stated in Chanter *v.* Leese, 4 Mees. & Welsb. 311. "The party contracting to pay his money is under no obligation to pay for a less consideration than that for which he has stipulated. If, indeed, he does accept a partial performance, and to a certain extent enjoys the benefit of that for which he has stipulated, it may become a question whether he may not be liable upon an implied contract to pay for what he has had. And when the consideration is in its nature capable of being divided, and the payment apportioned by the terms of the contract, there may be still a right to recover the portion due on the original contract." This decision was affirmed in the Exchequer Chamber, 5 Mees. & Welsb. 701, in 1839, and may be considered as the established doctrine in England at that day.

The rule of Lord Mansfield, according to its original application, and as expounded in the decision above mentioned, is reasonable. It brings us back to the contract to learn the intention of the parties. Courts are not required to speculate

upon the inequality of loss to the parties, or to look beyond the agreement to its performance, in order to ascertain its character, as suggested by some judges and commentators. 1 Saund. 320*a*. These inquiries are proper where the question arises, whether the plaintiff has any remedy for what he has done, or parted with, or whether the defendant is not estopped by his acts subsequent to the agreement, from insisting upon a condition precedent in his favor. Much of the confusion in the books, it is believed, arises from confounding the doctrine of waiver by matters *ex post facto*, with a rule of construction applicable to the agreement as it came from the hands of the parties. Havelock *v.* Geddes, 10 East, 555. A defendant may waive the performance by the plaintiff, in case of a covenant clearly dependent, and thus render himself liable in some form of action (Mitchell *v.* Darthez, 2 Bing. N. C. 555; Lucas *v.* Godwin, 3 Bing. N. C. 737), but it is only when the consideration is divisible, and the payments are apportioned by the agreement to the different parts of the consideration, that the covenant becomes independent, and a recovery can be had upon the original contract without averring performance, or an excuse for non-performance.

A covenant, therefore, which goes only to a part of the consideration, is not necessarily independent. Nor is it conclusive upon this point that the consideration is divisible in its own nature, or that a part of it has been received by the defendant; nor will the circumstance that one or any number of covenants in an agreement are independent, render others so. In Chanter *v.* Leese, 5 Mees. & Welsb. 311, the agreement was, that the defendants should have the exclusive use and sale of six different patents, and they were to pay £400 in half-yearly payments, for one of which payments the action was brought. The defence was a failure of title as to one of the patents. The grant of the exclusive right was an independent covenant, which the defendants could have enforced without any averment; the consideration for the undertaking of the defendants was divisible in its own nature. The undertaking upon which the action was brought went only to a part of the consideration to be paid; and the Court remarked, that although it had appeared affirmatively that the other five patents had been enjoyed by the defendants, the plaintiff could not have recovered on the contract. Terry *v.* Duntze, 2 H. Bl. 389, which was followed in our Supreme Court in Sears *v.* Fowler, 2 J. R. 272, in Havens *v.* Bush, 2 J. R. 387, and in Wilcox *v.* Ten Eyck, 5 J. R. 77, to the contrary, is not law in this State or in England. The two cases in 2 J. R. were expressly overruled in Cunningham *v.*

Morrell, 10 J. R. 203, and the Court in Wilcox *v.* Ten Eyck, observe, that that case could not be distinguished from Sears *v.* Fowler.

The decision in Bennett *v.* Pixley, 7 J. R. 249, is placed by the Court on the same ground with that of Sears *v.* Fowler, and Terry *v.* Duntze, and the reasoning of the Court in that case is overruled by Cunningham *v.* Morrell, and by Dey *v.* Dox, 9 Wend. 129. The case, I think, should be classed with Campbell *v.* Jones, 6 T. R. 570, and Tompkins *v.* Elliott, 5 Wend. 496, all of which fall within the principle of the first rule in Saunders, "that if a day be appointed for the payment of money, or part of it, or the doing of any other act, and the day is to happen, or may happen, before the thing which is the consideration of the money, or other act, an action may be brought for the money, or for not doing such other act before performance," etc. 1 Saund. 320*a*. The decisions in Term R. and in Wendell, were placed distinctly upon that ground (6 J. R. 572; 5 Wend. 499), and what fell from Lord Kenyon and Savage, J., beyond a mere recognition of the rule laid down by Lord Mansfield, was no way necessary to the determination of those cases. The judgments were unquestionably correct for other reasons assigned by those judges.

The question then returns, was the consideration in this case divisible, and were the payments apportioned by the agreement to the different parts of the consideration within the principles above stated? According to the contract, the $950 to be paid by the defendant, as therein stipulated, was the entire consideration for a complete title to the premises. The possession was incident to the title, the whole of which the defendant was to receive as the consideration for his payments. He received one element of a complete title, to wit, the possession, on November 1st, 1845. He then paid on the first of the following April, all that he was to advance by the terms of the agreement, until the fee should be added to the possession by a conveyance from the plaintiff, and the title of the defendant be then perfected. The plaintiff refuses or neglects to convey, and yet by this action claims the purchase-money of the defendant.

If we assume that the consideration of the defendant's undertaking was divisible, yet by the terms of the agreement he was to receive both the possession and a deed of the premises before he could be called upon for the payment of the instalment in controversy. These things were "to be done to him," according to the rule of Lord Holt, adopted in 10 J. R. 206. He was not to trust to the personal responsibility of the plaintiff.

9 Wend. 134. The plaintiff had covenanted that the thing stipulated should be performed before the defendant could be required to pay. Nor by the contract were the payments to be made by the defendant apportioned to any particular part of the consideration. He was not to pay anything for the possession as distinguished from the fee of the land, but a gross sum for both by separate instalments. If he had refused to accept a deed, all that the plaintiff could have recovered would have been the balance of the purchase-money with interest. On the contrary, had the plaintiff refused to convey, the recovery on the part of the defendant would have been confined to the difference between the contract price and the actual value of the land with interest. In a word, the covenant sought to be enforced against the defendant in this action, went to the whole consideration on the other side, and depended on it.

The judgment of the Supreme Court should be reversed.

FOOT, J. The question is, whether the covenants to pay the second and subsequent instalments are dependent.

So many decisions have been made on the vexed question of what are, and what are not, dependent covenants, and so many of them are irreconcilable, that they rather perplex than aid the judgment in determining a given case. One rule is universal, and that is, that the intent of the parties is to control. On reading the covenant in this case, it is clear to my mind, that giving the deed was to precede the payment of the second and subsequent instalments. The parties have said so in so many words. The deed was to be given on May 1st, 1846; and the second and subsequent instalments paid on the first day of April in the following years. If each had fulfilled his contract, the appellant would have had his deed when the second instalment was payable. The clause, "if the above conditions are complied with," can only apply to such conditions as were to be performed by the appellant before the deed by the terms of the contract was to be given. The possession is a mere incident which follows the title, and cannot be retained independently of it.

Judgment reversed.

ROLT *v.* COZENS.

IN THE COMMON PLEAS, MAY 28, 1856.

[*Reported in* 25 *Law Journal, New Series, Common Pleas*, 254.]

THE declaration stated that by a certain agreement made and entered into by and between the plaintiff and certain persons named Burlington, Wale & Dawe, it was agreed by Wale & Dawe that in consideration of the plaintiff, by the said agreement, agreeing to supply one W. Fowler with timber and deal to the value of £200, the said Wale & Dawe severally agreed to guarantee to the plaintiff the due payment of any amount for such timber not exceeding £200 within six months from the sale of the said timber. That in pursuance of such agreement he, the plaintiff, did supply timber to the amount of £153 10*s*. 1*d*. to the said W. Fowler. That afterward and while such timber was unpaid for, and before the period of six months from the date of the sale of the timber had elapsed, the plaintiff became and was dissatisfied with such guarantee so given by Wale & Dawe ; and thereupon by another agreement (that on which the action was brought) made and entered into by and with the plaintiff and the defendant in July, 1855, after reciting the said guarantee, and that the plaintiff had delivered timber to the amount of £153 10*s*. 1*d*., and that the plaintiff was not satisfied with such guarantee, the defendant, at the request of the said Wale & Dawe, in consideration of the premises and of the plaintiff forbearing to take any proceedings against Wale & Dawe, guaranteed to the plaintiff the sum of £153 10*s*. 1*d*. on December 13th then next. Averment, that the plaintiff has done everything, etc. Breach, non-payment.

Fourth plea. That the plaintiff has not done anything on his part to entitle him to be paid by the defendant the said sum of £153 10*s*. 1*d*., as the plaintiff did not forbear to take the said proceedings, in the declaration mentioned, against the said Wale & Dawe, but, on the contrary, took such proceedings before the said December 13th next after the making of the said alleged agreement.

At the trial, before Alderson, B., at the Spring Assizes for Surrey, 1856, the plaintiff had a verdict on all the issues, except that upon the fourth plea. It was proved that before December 13th —namely, on December 8th, a writ had been issued, at the suit of the plaintiff against Wale & Dawe. The learned judge ruled that proceedings had been taken, but it was contended, for the

plaintiff, that the not taking proceedings against Wale & Dawe was not a condition precedent to his right to recover. The jury found a verdict for the defendant on the fourth plea, leave being reserved to the plaintiff to move to enter a verdict with damages *non obstante veredicto*.

A rule *nisi* was afterward obtained to enter judgment for the plaintiff *non obstante veredicto ;* or to set aside the verdict and enter a verdict for the plaintiff on the fourth plea, or for a new trial.

Garth showed cause.

JERVIS, C.J. It seems to me that this rule ought to be discharged. To my mind, the second point, about part of the consideration having been given, does not arise. It would arise only if we should be of opinion that the guarantee was general, and intended to impose on the plaintiff continued forbearance. It seems to me that that is not so. The plaintiff said to the defendant, "If you will forbear till December 13th, and if Wale & Dawe do not pay you then, I will do so." The case is not distinguishable from Neale *v.* Ratcliffe.

CRESSWELL, WILLIAMS, and WILLES, JJ., concurred.

Rule discharged.

BANKART AND ANOTHER *v.* BOWERS.

IN THE COMMON PLEAS, MAY 1, 1866.

[*Reported in Law Reports*, 1 *Common Pleas*, 484.]

THE first count of the declaration stated that by an agreement dated July 31st, 1863, and made between the defendant of the one part and the plaintiffs of the other part, it was agreed that the defendant should sell to the plaintiffs, and that the plaintiffs should purchase from the defendant, the equity of redemption of and in certain lands, etc., known as the Turnhurst Hall estate, in Wolstanton, in the county of Stafford, save and except certain closes therein described, and of and in all the mines, beds, and veins of coal, ironstone, and other mineral within and under the same, together with all the engines, colliery buildings, and plant then being upon the same estate ; and that payment should be made for the same by the plaintiffs on the terms and in the manner therein mentioned ; and the defendant by the said agreement, and in consideration of the premises, agreed with the plaintiffs that the defendant would purchase from the plaintiffs all coal that the defendant might

require from time to time, at the fair market rate. Averment, that although all things on the plaintiffs' part had been duly performed and fulfilled according to the terms of the agreement necessary to entitle the plaintiffs to sue for the breach thereinafter mentioned, and although the plaintiffs were and still continued and always had been from the making of the said agreement, ready and willing to sell and supply to the defendant such coal as the defendant required, at the fair market rate, according to the terms of the agreement and the true intent and meaning thereof. Breach, that the defendant did not after the making of the agreement purchase or take from the plaintiffs all coal that he required, according to the agreement, or more than a very small and inconsiderable quantity of the coal which he required, and a much less quantity thereof than was by him so agreed to be purchased and taken, and, on the contrary, he took large quantities of coal from persons other than the plaintiffs, whereby the plaintiffs lost profits, etc.

Plea, that the agreement in the first count mentioned was and is an agreement in writing, in the words and figures following —that is to say, "Memorandum of agreement made this 31st of July, 1863, between G. F. Bowers, of etc., china manufacturer, of the one part, and F. Bankart, of etc., and H. Bankart, of etc., copper-smelters, of the other part, as follows: 1. The said G. F. Bowers agrees to sell to the said F. Bankart and H. Bankart, and the said F. Bankart and H. Bankart agree to purchase from him, the equity of redemption in all the mines, beds, and veins of coal, ironstone, and other minerals within and under the estate called the Turnhurst Hall estate, situate, etc., containing in the whole 110A. 3R. 27P., or thereabouts, together with all the engines, colliery buildings, and plant now being upon the said estate, which together with the surface of the estate are subject to a mortgage of £1750 to Messrs. C. & J., and also all the rights and interests of the said G. F. Bowers under a contract entered into by him on the 9th of March, 1863, with T. F. H., for the granting by him to the said G. F. Bowers for the term of forty-two years from the 31st of January, 1863, of power and authority to use a certain railway or tramway to be constructed over lands of the said T. F. H. at etc. 2. The consideration for such purchase shall be the payment by the said F. Bankart and H. Bankart to the said G. F. Bowers of £2000 in manner following, £500 in cash on the execution of the conveyance, and the remainder in bills of exchange for £1500 and interest extending over nine months from the execution of the said conveyance. 3. The said G. F. Bowers agrees to sell to the said F. Bankart and H. Bankart, and the said F. Bankart

and H. Bankart agree to purchase of him, the equity of redemption in the whole of the said Turnhurst Hall estate, the mines and minerals in and under which are hereby contracted for, with the mansion house called Turnhurst Hall, and the other buildings thereon (except the field called Big Brent, containing 8A. 3R. 11P., or thereabouts, and also except such portion of the field called Delph Field as is marked off with a red outline on a certain plan, etc., for house-building purposes only. 4. The consideration for said purchase of the surface of the said estate, mansion house, and buildings (except as aforesaid), shall be the payment by the said F. Bankart and H. Bankart to the said G. F. Bowers of the sum of £4000 in manner following, the sum of £2000 in cash on the execution of the conveyance, and the remainder in bills of exchange for £2000 and interest extending over two years from the execution of the conveyance. 5. The said F. Bankart and H. Bankart shall take upon themselves all the engagements and liabilities of the said G. F. Bowers under the said agreement with the said T. F. H., and shall protect and indemnify the said G. F. Bowers from and against all such engagements and liabilities. 6. The said F. Bankart and H. Bankart shall be entitled to the rent of the surface of the Turnhurst Hall estate as from the 24th of June, 1863. 7. The said G. F. Bowers shall purchase from the said F. Bankart and H. Bankart all coal that he may from time to time require, at the fair market rate. 8. The said G. F. Bowers shall deduce a good title to all the property comprised in this agreement." Averment, that it was not agreed by and between the defendant and the plaintiffs as in the first count mentioned, save and except as in and by the said written agreement in this plea particularly set forth as aforesaid ; and that the plaintiffs did not nor would purchase from the defendant, although the defendant was ready and willing to sell to the plaintiffs, the said equity of redemption, or the engines, colliery buildings, or plant in the first count mentioned, on the terms in the said agreement mentioned.

Demurrer, on the ground that the completion of the purchase was not a condition precedent to the performance of the contract declared on. Joinder.

Watkin Williams in support of the demurrer.

T. Jones in support of the plea.

ERLE, C.J. I am of opinion that our judgment upon this demurrer should be for the defendant. Where there is a contract by one party to sell an article and by the other party to pay for it, no time being named, it would be a strong thing to say that the buyer shall pay the money before he gets the consider-

ation. The effect of the agreement set out in the plea is, that the plaintiffs are to buy the mines and minerals from the defendant, and the defendant is to take all the coals he may require from the plaintiffs. These clearly are concurrent acts.

BYLES, J. The effect of Watkin Williams's argument is, that the defendant must keep the mines, and yet is bound to buy his coals of the plaintiffs.

KEATING, J. We must look to the whole agreement in order to ascertain what was the intention of the parties. We should obviously be frustrating that, if we were to yield to the argument of Williams.

MONTAGUE SMITH, J., concurred.

Judgment for the defendant.

PATRICK SHEEREN *v.* JOHN MOSES ET AL.

IN THE SUPREME COURT OF ILLINOIS, JANUARY, 1877.

[*Reported in* 84 *Illinois Reports* 448.]

WRIT of error to the Circuit Court of Scott County; the Hon. Cyrus Epler, J., presiding.

Oscar A. De Leuw for the plaintiff in error.

H. Case for the defendants in error.

SHELDON, C.J., delivered the opinion of the Court.

This was a suit brought on June 10th, 1876, by the executors of the estate of Robert McCracken, deceased, against Patrick Sheeren, upon three promissory notes, under seal, made by the latter, for the sums, respectively, of $500, $500, and $1000, bearing date September 17th, 1870, payable to Robert McCracken, the first on December 10th, 1870, the second on December 10th, 1873, the third on December 10th, 1875, all with 6 per cent interest from June 10th, 1870, and 10 per cent interest after due.

The only question raised is as to the sufficiency of two pleas, to which demurrers were sustained by the Court below.

One plea sets up that the notes were given as the consideration of an agreement entered into between the plaintiffs' testate, Robert McCracken, of the first part, and the defendant, Patrick Sheeren, of the second part, as follows:

"The party of the first part doth sell to the party of the second part an eighty-acre lot of land, known and described as follows—viz.: The west half of the southeast quarter of section three (3), township thirteen (13), range eleven (11) west, containing eighty (80) acres, in Scott County, and State of Illinois; and for and in consideration of said land, and a clear deed for

the same, as soon as the last payments are made, the party of the second part engages to pay the party of the first part $25 per acre, in the following payments—viz.: In six months from this date, five hundred dollars ($500) ; five hundred dollars in three years from date, and one thousand dollars in six years from date, with interest commencing from this date, to be paid yearly on all the notes, at 6 per cent, and when the cash payment is made, the party of the first part, his heirs or assigns, shall execute a clear deed for said land, this 10th June, 1870 ; and the party of the second part is to pay the taxes."

(Signed by the parties.)

The plea averring the defendant, in pursuance of the agreement, had ever been ready and willing to pay the notes, but there had never been any offer or tender to him of a deed for the land described in the agreement.

The other plea alleges that the notes were given as the consideration for the purchase of the above described tract of land ; that previous to the making of the notes there had been made, and at that time existed, between the defendant and Robert McCracken, an agreement in writing, setting it out as above, and that on September 17th, 1870, in pursuance of such agreement, the defendant executed the notes declared upon ; that the first one was correctly drawn, but that the second and third notes were, by the scrivener, incorrectly and improperly drawn as to their times of payment, in this, that the scrivener drew the last two notes as maturing on December 10th, 1873, and on December 10th, 1875, when the same should have been written to mature as by the terms of the above agreement, and as was the intention of the parties—viz., on June 10th, 1873, and on June 10th, 1876, respectively ; that the defendant, in pursuance of the agreement, had entered into the possession of said premises, but there had never been offered or tendered to him a clear deed to the land, although the defendant had always been ready and willing to pay the notes.

The notes appear, by the averments of the pleas, to have been given for the moneys due and payable by the agreement of June 10th, 1870. They were given, then, for the purchase money of land, the deed for the land to be given, as we understand the agreement, upon making the last payment, which is represented by the last note. The payment of the last note, and the making of the deed, we must regard as mutual and dependent acts, and that to maintain an action upon that note there should have been a tender of a deed before bringing suit. Headley *v.* Shaw, 39 Ill. 354 ; Hunter *v.* Bilyeu, 39 Ill. 368 ; Johnson *v.* Wygant, 11 Wend. 48.

But it is different with the two other notes. They were to be paid before the time fixed for the conveyance of the land, and as respects them, the agreements were independent of each other, and tender of a deed before suit was not necessary. If a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen, or may happen, before the thing which is the consideration of the money or other act is to be performed, an action may be brought for the money, or for not doing such other act, before performance, for it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent. 1 Saund. 320, note 4. The obligation of the defendant to pay the first two notes at the times stipulated, was absolute and unconditional. A cause of action accrued upon each note as soon as it became payable, and there is nothing in the agreement to defeat the right of action afterward.

By neglecting to enforce payment of the first two notes when they became due, and by waiting until the last note became due and the time for making the conveyance had elapsed, the promises to pay the first two notes, once absolute and independent, did not become mutual and dependent. This was so expressly decided in Duncan *et al. v.* Charles, 4 Scam. 561.

That was a parallel case, and decided the exact point made upon these pleas. Under its authority, the first two notes, here, are recoverable without a tender of a conveyance, and the pleas must be held bad, as respects them.

The demurrers to the pleas were, then, properly sustained, and the judgment is affirmed.

Judgment affirmed.

THE DUKE OF ST. ALBANS *v.* SHORE.

IN THE COMMON PLEAS, JUNE 29, 1789.

[*Reported in* 1 *Henry Blackstone* 270.]

DEBT for £500, the penalty of articles of agreement.

The declaration stated the agreement to have been made between the plaintiff and defendant on March 30th, 1787, by which the defendant was to purchase of the plaintiff a certain farm with the appurtenances, together with an acre and a half of boggy land, at the price of £2594, which was to be paid at Lady-day then next, in the following manner: the plaintiff was to accept of a conveyance and surrender of certain copyhold and leasehold premises of the defendant, at the price of £1820

(to be deducted from the before-mentioned sum of £2594), the defendant to convey those premises at the expense of the plaintiff unless a fine should be necessary, the expense of which the defendant was to pay ; and the plaintiff to make a good title to the defendant at his, the defendant's, expense, unless a fine or recovery should be necessary, for which the plaintiff was to pay, who, on executing the conveyances, was to receive the rest of the purchase-money. All timber trees, elms, and willow trees, which then were upon any of the above estates, to be fairly valued, by two appraisers, and the prices or values thereof to be paid by the respective purchasers of the estates at the time before mentioned ; the rents of the respective estates to be received by the owners, till March 24th then next. It was also agreed, that in case the plaintiff should not be enabled to make a good title to the said estate before the said March 24th, that agreement should be void. And although the plaintiff had done and performed everything on his part, etc., yet protesting that the defendant had not done anything on his part, etc., "in fact, the said duke said, that he, the said duke, always from the time of the making of the said articles of agreement, until and upon the said March 24th next ensuing the date thereof, and always since had been and is capable, ready, and willing to make a good title to the said William Shore, of the said farm and premises, and boggy land so agreed to be purchased by the said William Shore as aforesaid, and to execute and cause to be executed necessary and proper conveyances, and assurances, of the said farm, and premises, and boggy lands, to the said William Shore, if the said William Shore would have drawn and prepared the same for execution, according to the form and effect of the said articles of agreement, to wit, at Hanworth aforesaid. And the said duke avers, that he, the said duke, before March 25th, being Lady-day, 1788, to wit, on March 22d, 1788, A.D., at Hanworth aforesaid, gave notice to the said William Shore, that he, the said duke, was ready and willing at any time to make a good title to the said William Shore of the said farm, and premises, and land, so agreed to be purchased by the said William Shore, and to execute and cause to be executed proper deeds, conveyances, and assurances for that purpose, if the said William Shore would prepare the same, he, the said duke, then and there being, and still being enabled to make, and capable of making a good title, to the said William Shore, of the said farm, and premises, and land, according to the form and effect of the said articles ; yet the said William Shore did not, nor would, on or before said March 24th next ensuing the date of the said articles of agreement, nor had he

at any time hitherto drawn or prepared, or caused to be drawn or prepared to be executed, any deed, conveyance, or assurance whatsoever, of the said farm, and premises, and lands mentioned in the said articles of agreement, and so agreed to be purchased by the said William Shore as aforesaid, nor did, nor would pay the said purchase-money, or any part thereof, nor did, nor would accept the said title according to the said articles of agreement; but on the contrary thereof, the said William Shore had wholly neglected and refused, and still doth neglect and refuse, to draw or prepare any deed, conveyance, or assurance of the said farm, premises, and land, unto the said William Shore, or to pay the said purchase-money, or any part thereof, or in any wise to carry the said articles into execution, contrary, etc."

Plea: "That the said duke was not capable, ready, and willing to make, nor could he, the said duke, make a good title to the said William of the said farm so agreed to be purchased, according to the tenor and effect of the said agreement, etc." And for further plea, etc., that after the making of the said agreement, and before Lady-day then next following, to wit, on March 20th, 1788, A.D., the said duke cut down divers, to wit, 500 of the said timber trees, 500 of the said elms, and 500 of the said willow trees, in the said declaration and agreement respectively mentioned, and by the said agreement agreed to be valued and paid for as in the said agreement is mentioned, whereby the said duke disabled himself from performing, and it became, and was impossible for him to perform and fulfil the said articles of agreement, on his part, etc., for which reason, he, the said William, declined and refused to carry the said articles into execution on his part, as he lawfully might, etc."

Replication: Issue on the first plea, and general demurrer to the second. Joinder in demurrer.

This was argued in Hilary Term last, by Lawrence for the plaintiff, and Bond for the defendant, and a second time in Easter Term by Le Blanc for the plaintiff, and Marshall for the defendant.

On this day, the following judgment of the Court was delivered by Lord Loughborough, who having stated the pleadings, said:

It is clear in this case, that unless the plaintiff has done all that was incumbent on him to do, in order to create a performance by the defendant (if I may use the expression), he is not entitled to maintain the action. If he has not set forth a sufficient title, judgment must be against him whatever the plea is,

and if the plea be a good bar, the same consequence must follow. It was argued on the part of the plaintiff, that the agreement respecting the trees was not a condition precedent, and therefore a breach of that agreement could not be pleaded in bar of the action. In support of this argument, the case of Boone *v.* Eyre was cited ; but in that case, though the Court of King's Bench held the plea insufficient, yet they laid down a clear and well-founded distinction, that where a covenant went to the whole of the consideration on both sides, there it was a condition precedent ; but where it did not go to the whole, but only to a part, there it was not a condition precedent, and each party must resort to his separate remedy ; and for this plain and obvious reason, because the damages might be unequal. The cases also of Hunlocke *v.* Blacklowe, 2 Saund.[1] and Cole *v.* Shallet, 3 Lev.[2] were cited as being in favor of the plaintiff. But it is unnecessary to enter into the discussion of those cases ; though perhaps doubts may reasonably be entertained of the doctrine laid down in Saunders, and though the case cited by him in his argument may deserve full as much consideration as that which was the subject of the determination of the Court. For we found our opinion on the present case, on the ground of the distinction in Boone *v.* Eyre, which we think a fair and sound one. Then the question is, Whether the covenant of the plaintiff goes to the whole consideration of that which was to be done by the defendant? Now, the duke clearly covenanted to convey an estate to the defendant, in which all the timber growing on the estate was necessarily included. The timber was not disjoined from the estate by the separate valuation of it. It was expressly agreed that all trees, etc., which then were upon any of the estates should be valued. But it is not to be permitted to a party contracting to convey land, which includes the timber, by his own act to change the nature of it, between the time of entering into the contract and that of performing it. There may be cases where the timber growing on an estate is the chief inducement to a purchase of that estate. But it is not necessary to inquire whether it be the chief inducement to a purchase or not ; for if it may be in any sort a consideration to the party purchasing to have the timber, the party selling ought not to be permitted to alter the estate, by cutting down any of it. This is not an action of covenant where one party has performed his part, but is brought for a penalty on the other party refusing to execute a contract. But to entitle the party bringing the action to a penalty, he ought punctually, exactly, and literally to com-

[1] 119. [2] 41.

plete his part. We are therefore of opinion that the plea is a good bar to the action, and on this we give our judgment. My brother Marshall made some exceptions to the declaration, which it is not necessary to go into, but which, speaking for myself, I think material. It is to be observed that this is not a contract absolutely and at all events to convey. Where a man undertakes to convey, he undertakes to convey by a good title. There are cases where a Court of Equity has holden, that a party so undertaking might make a title by procuring an act of Parliament, and that he was bound to purchase in all outstanding terms to make a good title. But in this case if the plaintiff was not enabled to make a good title before a certain day, the agreement was to be at an end, he might be off, and was released from his engagement. He therefore undertook to make a good title before a given time ; the breach assigned is, that the defendant refused to accept the title. But what title ? What exhibition of title ? What title was tendered to him ? What was there for him to accept ? This perhaps is rather *dehors* the question, though it might be material if it were necessary to take it into consideration. But the ground of our determination is, that the plea is good, as I before stated, within the distinction laid down by the Court of King's Bench in the case of Boone *v.* Eyre.

Judgment for the defendant.

HOARE AND OTHERS *v.* RENNIE AND ANOTHER.

IN THE EXCHEQUER, NOVEMBER 16, 1859.

[*Reported in* 5 *Hurlstone & Norman* 19.]

DECLARATION. First count : that on April 21st, 1857, A.D., the defendants agreed to buy of the plaintiffs, and the plaintiffs then agreed to sell to the defendants, about 667 tons of hammered Swede bar iron of certain sizes, then agreed on between the plaintiffs and the defendants, the said iron to be shipped from Sweden in the months of June, July, August, and September next, and in about equal portions each month, at £15 10*s.* per ton delivered in good condition ex ship, on arrival in the port of London ; and it was thereby then further agreed, among other things, that no shipment should exceed 150 tons, which should be in proportionate quantities of each size ; but that if any variation therein it should not exceed one ton, and such variation to be corrected in subsequent shipments, that

sellers should have the option of commencing shipments in May, 1857, and also of completing the whole by the end of July, 1857 ; that ships' names should be declared as soon as known to the sellers ; that if any should be lost on the voyage the quantity lost should be null and void, and that there should be discount at the rate of $2\frac{1}{2}$ per cent for cash against each delivery. Averments : That plaintiffs had done all things necessary on their part to be done, etc.; and though all things had happened and all times had elapsed to entitle them to have the said iron accepted, yet the defendants have wholly refused to accept the said iron or any part thereof, or to pay for the same according to the terms of the said agreement, whereby the plaintiffs lost divers profits, etc.

Second count. That on April 21st, 1857, A.D., the plaintiffs agreed to sell to the defendants, and the defendants agreed to buy of the plaintiffs, about 667 tons of hammered iron, upon the terms in the first count mentioned ; and that from the time of the making the agreement continually until after the refusal, notice, and discharge herein after mentioned, the plaintiffs did and performed all conditions precedent, and all things were done, and all times elapsed, necessary to entitle them to the performance of the agreement on the part of the defendants ; and that at and after the refusal, notice, and discharge, hereinafter mentioned, they were ready and willing to perform the agreement on their part ; and although the plaintiffs, in part performance of the said agreement, did, in June, 1857, A.D., ship a certain portion of the said iron, and did, in further performance of such agreement, and within a reasonable time after such shipment, tender to the defendants and offered to deliver to them the said portion of iron so shipped as aforesaid, yet the defendants refused to accept the said portion of iron so tendered and offered, and thenceforth wholly refused to accept the same or any of the residue of the said iron, and gave notice to the plaintiffs that they would not accept the residue of the said iron ; and the defendants thenceforth wholly refused to observe the agreement on their part, and wholly discharged the plaintiffs from the further execution and performance of the agreement by them ; and wholly waived such execution and performance, whereby, etc.

Third plea to the first count. That the plaintiffs did not avail themselves of the option given to them by the agreement of commencing shipments of the iron in the month of May ; and that the plaintiffs in the month of June shipped from Sweden, on board a certain vessel, a quantity of the said iron so contracted for, to wit, 21 tons, 6 cwt., 1 qr., being a much

less quantity than was required to be shipped during the said month of June, according to the terms of the said contract, and gave notice to the defendants that the said iron was to be part of the iron so agreed to be sold as aforesaid ; that the plaintiffs failed to complete the shipment for the month of June according to the terms of the contract, and were never ready and willing to deliver to the defendants such a quantity of iron, shipped from Sweden in June, as is specified in the said contract, although none of the iron was lost during the voyage ; and were not ready and willing to deliver to the defendants the said small quantity of iron which had been shipped during the month of June, until after the month of June had elapsed, and until after the defendants had notice that the plaintiffs were not ready and willing, and were unable to fulfil their part of the said agreement with reference to the quantity of iron to be shipped in June ; and that the defendants, having notice of all the premises in this plea mentioned, did afterward refuse to receive the said quantity of iron so shipped as aforesaid during the month of June, and did give notice to the plaintiffs that they refused to receive the residue of the said iron.

The sixth plea, to the second count, was similar to the third plea.

The plaintiffs demurred to the third and sixth pleas, and the defendants joined in demurrer.

Wilde (with whom was *Holland*) in support of the demurrer.

Bovill in support of the pleas.

POLLOCK, C.B. We are all agreed that the defendants are entitled to judgment upon the pleas. The foundation of my opinion is shortly this, that a man has no right to say that which is a breach of an agreement is a performance of it. On that ground this case is distinguishable from almost every other which has been cited. It does not turn upon any question of condition precedent. The only question is whether, if a man who is bound to perform his part of a contract does not do so, he can enforce the contract against another party. The plaintiffs contracted with the defendants to ship a large quantity of iron in June, July, August, and September, about one-fourth part in each month ; but instead of shipping about 160 tons in June, as they should have done, they shipped little more than twenty tons as a performance of the contract. The first count states that the plaintiffs performed all things necessary on their part to be performed, that they were ready and willing to do all things which according to agreement it was necessary they should be willing to do, and that all things happened to entitle the plaintiffs to a performance of the agreement on the

part of the defendants. This is denied by the plea. The second count states that the plaintiffs, in part performance of the contract, shipped a certain portion of the iron, and, in further performance of the agreement, tendered and offered to deliver the said portion so shipped, yet defendants refused to accept the same. The pleas raise the question whether the defendants were bound to accept and pay for what was sent and tendered; the plaintiffs having in June shipped from Sweden a quantity much less than they were bound to have shipped, and the defendants having insisted that this was a breach of the contract and given notice that they refused to accept the residue. The pleas expressly state that the plaintiffs were not ready to deliver such a quantity of iron shipped from Sweden in June as is specified in the contract, and were not ready and willing to deliver the small quantities shipped until after the month of June had elapsed, and until after the defendants had notice that the plaintiffs were not ready and willing to perform their part of the agreement. The only question we have to deal with is whether, on a contract like this, if the sellers at the outset send a less quantity than they are bound to send, so as to begin with a breach, they can compel the purchasers to accept and pay for that, the sending of which was a breach and not a performance of the agreement. The argument on the part of the plaintiffs is that this was not a condition precedent. I do not think that is the test. It was said that if the plaintiffs had sent the one-hundredth part instead of one-fourth part in June, the defendants' remedy would have been by a cross action. The case was put of the plaintiffs sending a short quantity after one shipment had been accepted. Possibly that might have made a difference. Where a person has derived a benefit from a contract, he cannot rescind it because the parties cannot be put in *statu quo*. Probably, therefore, in such case, the defendants could not have repudiated the contract and must have been left to their cross action. Here, however, the defendants refused to accept the first shipment, because, as they say, it was not a performance but a breach of the contract. Where parties have made an agreement for themselves, the courts ought not to make another for them. Here they say that, in the events that have happened, one fourth shall be shipped in each month, and we cannot say that they meant to accept any other quantity. At the outset the plaintiffs failed to tender the quantity according to the contract: they tendered a much less quantity. The defendants had a right to say that this was no performance of the contract, and they were no more bound

to accept the short quantity than if a single delivery had been contracted for. Therefore the pleas are an answer to the action.

Judgment for the defendants.[1]

JONASSOHN AND ANOTHER *v.* YOUNG.

IN THE QUEEN'S BENCH, JUNE 24, 1863.

[*Reported in* 4 *Best & Smith* 296.]

THE declaration stated that it was agreed, by and between the plaintiffs and the defendant, that the plaintiffs should sell and deliver to the defendant, and that the defendant would purchase of the plaintiffs, as many of the plaintiffs' Nettlesworth gas coals, equal in quality to a certain cargo of them before then shipped on trial by a steam-vessel called The Great Northern, as one steam-vessel could fetch in nine months, proceeding to Sunderland, and after loading the cargo proceeding with it from thence to London, and after discharging the cargo at London proceeding back again to Sunderland for another cargo, and thence back again with the cargo to London, and so on until the expiration of the nine months ; the steam-vessel to be sent by the defendant for the coals and the plaintiffs to ship them on board of it at Sunderland, at and for a certain price, to wit, 5*s*. 9*d*. per ton, to be paid by the defendant to the plaintiffs at the beginning of each month for the preceding month's supply, less £2 10*s*. per cent discount. Averment, that the plaintiffs have always been ready and willing to sell and deliver to the defendants and ship the coals on the terms aforesaid, and have done all things, and all things have happened, and all times have elapsed, necessary to entitle the plaintiffs to have the agreement performed by the defendant on his part, etc. Yet the defendant neglected and refused to send, and made default in sending, a steam-vessel to Sunderland to fetch divers cargoes, or the quantity of the coals which he ought, according to the agreement, to have fetched and accepted ; and the defendant, before the expiration of the nine months, wholly and absolutely refused to send any other steam-vessels for the coals, or to accept any more of the coals, and declared to the plaintiffs that he would not perform any more

[1] The concurring opinions of Barons Watson and Channell have been omitted.—ED.

the agreement, and exonerated and discharged the plaintiffs from any further performance thereof on their part, and by reason of the premises the plaintiffs have been much injured.

Third plea. That, before any breach by the defendant of the agreement, the plaintiffs broke the contract by delivering and shipping to the defendant, in pretended fulfilment thereof, gas coal which was no part thereof equal in quality to the cargo shipped on trial, but was very inferior thereto, and wholly unfit for the defendant's purposes, as the plaintiffs well knew; whereupon and wherefore the defendant, immediately upon discovering the plaintiffs' default, and within a reasonable time in that behalf, refused to fetch or accept any more of the coal.

Fourth plea. That, before any breach by the defendant of the agreement, the plaintiffs broke their contract, to wit, by detaining the defendant's vessel an undue and unreasonable length of time, and far beyond the time permitted by the contract, and contrary to the defendant's will, upon divers occasions upon which the defendant had sent the same to the plaintiffs to be loaded with coal under the agreement, and by not loading the vessel with coal as aforesaid, on any or either of the occasions, until after the lapse of a long and unreasonable space of time after they had notice that such vessel was ready to receive coal, and thereby greatly injured and damnified the defendant; whereupon and wherefore he, immediately upon notice of the plaintiffs' default, refused to fetch or receive any more of the coal.

Demurrer to each plea, and joinder.

Hannen (*Bidder* with him) in support of the demurrer. The substance of both pleas is, that, because the contract had been broken in part by the plaintiffs, whether in not delivering coals equal to sample, or in detaining the defendant's vessel beyond the time permitted by the contract, the defendant is justified in refusing to carry out the contract for the remainder of the period to which it related; but such a plea is bad both on principle and authority. Weaver *v.* Sessions, 6 Taunt. 154; Franklin *v.* Miller, 4 A. & E. 599. In Withers *v.* Reynolds, 2 B. & Ad. 882, where there was a refusal by the plaintiff to complete the contract, Patteson, J., said, p. 885: "If the plaintiff had merely failed to pay for any particular load, that, of itself, might not have been an excuse to the defendant for delivering no more straw, but the plaintiff here expressly refuses to pay for the loads as delivered; the defendant, therefore, is not liable for ceasing to perform his part of the contract." [Wightman, J. The plaintiff in effect said, "If you send a load of straw I will not pay for it." Crompton, J. If

the purchaser of goods refuses to pay for them, or is insolvent, the vendor is not bound to deliver. But these pleas allege a breach of the contract by the plaintiff as to part only.] They do not show that the plaintiffs were unable or unwilling to supply coals according to the contract. In Hoare *v.* Rennie, 5 H. & N. 19, the plea alleged that the plaintiffs failed to complete a shipment of iron for the month of June according to the contract, and were never ready and willing to deliver to the defendants such a quantity of iron in June as was specified in the contract; and the plea was held good; there the refusal of the plaintiffs to supply the iron would have postponed the performance of the contract indefinitely. [Crompton, J. That case belongs to the class in which the breach alleged in the plea is an entire frustration of the contract. Blackburn, J., referred to Hochster *v.* De La Tour, 2 E. & B. 678.]

Keane, *contra*. Hoare *v.* Rennie, 5 H. & N. 19, supports the third plea. As soon as the defendant discovered that the plaintiffs had knowingly sent an inferior coal to that stipulated for, he was justified in throwing up the contract. [Wightman, J. Suppose the plaintiff intended in future to send such coal as was stipulated for. Blackburn, J. The third plea does not aver that the plaintiffs persisted in sending an inferior coal.] The contract is the employment of a vessel during a limited time, and for getting coal of a specified quality; the non-supply of that coal, and the unnecessary detention of the vessel by the plaintiffs, go to the root of the contract. [Crompton, J. The vice of both pleas is the same, that the breach goes only to part of the consideration. The argument for the defendant must go this length, that the supply of one chaldron of coal of an inferior quality, or the unnecessary detention of the defendant's vessel for one hour, would entitle him to put an end to the contract. In Hoare *v.* Rennie we must take it that time was of the essence of the contract. Blackburn, J. The reasoning of the judges in that case does not apply to the plea pleaded to the second count. As reported, it looks as if the Court forgot the second count. Crompton, J. We must consider that the breaches alleged in the pleas in that case went to the root of the matter.]

Hannen was not called upon to reply.

Per CURIAM. (WIGHTMAN, CROMPTON, and BLACKBURN, JJ.) Judgment for the defendant.

EDWARD H. WELLS *v.* WILLIAM CALNAN.

In the Supreme Judicial Court of Massachusetts, September Term, 1871.

[*Reported in* 107 *Massachusetts Reports* 514.]

Contract on a written agreement, dated December 22d, 1868, by which the plaintiff agreed to sell and the defendant to buy "the farm now occupied by" the plaintiff "and his father" (describing it by metes and bounds), for $3250, which the defendant agreed to pay on April 10th, 1869, and it was provided that "no wood should be cut and removed from the premises save firewood for use in the house," that the plaintiff on receiving payment should execute and deliver to the defendant a proper deed for the conveying and assuring to him of "the fee simple of the said premises," and that for the due performance of the agreement each party was bound to the other in the sum of $500, "which said sum is to be taken as liquidated damages." The declaration alleged the making of the agreement, and that the plaintiff executed a good and proper deed for conveying and assuring to the defendant in fee simple "the premises described in said agreement," and tendered said deed to the defendant on April 10th, 1869, and demanded payment of the $3250 of the defendant, but that the defendant refused to pay the same, and also refused to pay the $500 as liquidated damages; and that the defendant owed the plaintiff $500. The answer admitted the making of the agreement, but denied the making or tender of a good and sufficient deed, and all the other allegations of the declaration.

At the trial in the Superior Court, before Pitman, J., it appeared that the plaintiff tendered a deed in due form on April 10th, 1869; that the farm-house and outbuildings on the land were burned on the preceding day; that the defendant for that reason refused to accept the deed or pay the price; that the estate at the time of the contract was worth at least $3250, but after the fire was worth not more than $2000; and that the plaintiff had obtained insurance upon the buildings in the sum of $2000, and had received of the insurance company, in settlement of his claim against them, the sum of $1600.

The defendant offered to show that the insurance company, before the commencement of this action, offered the plaintiff to take from him a quitclaim deed of the estate, and pay him the

full contract price. But the judge excluded the evidence as immaterial.

The plaintiff contended that he was entitled to the $500 as liquidated damages, while the defendant contended that it was to be treated as a penal sum. But the judge ruled "that this question was of no importance, because, if the plaintiff was entitled to demand payment of the contract price notwithstanding the loss of the buildings, he had sustained damage to a larger amount by the defendant's refusal."

The defendant requested the Court to instruct the jury that they might consider the amount received by the plaintiff from the insurance company in their estimate of his damages, and might return a verdict for nominal damages only; but the judge instructed them to the contrary.

The jury returned a verdict for the plaintiff in the sum of $546.83, being the amount claimed, with interest; and the case was reported to this Court; if error appeared in the rulings, the verdict to be set aside and a new trial had; otherwise, judgment to be entered on the verdict.

W. G. Bates for the defendant.

H. Morris & N. T. Leonard for the plaintiff.

GRAY, J. The principles of law, upon which the rights of the parties to this case depend, appear to have been overlooked at the trial.

When property, real or personal, is destroyed by fire, the loss falls upon the party who is the owner at the time; and if the owner of a house and land agrees to sell and convey it upon the payment of a certain price which the purchaser agrees to pay, and before full payment the house is destroyed by accidental fire, so that the vendor cannot perform the agreement on his part, he cannot recover or retain any part of the purchase-money.

For these reasons, in Thompson *v.* Gould, 20 Pick. 134, where, after the making of an oral agreement for the sale and purchase of a house and land, and the purchaser's entry into possession and payment of part of the price, but before delivery or tender of the deed, the house was destroyed by fire, it was held by this Court, in an elaborate judgment delivered by Wilde, J., that he was entitled to recover back the money paid, on the ground of a failure of the consideration.

In Bacon *v.* Simpson, 3 M. & W. 78, the plaintiff had agreed to sell, and the defendant to purchase, a lease for years of a dwelling-house at a certain price, and the furniture, tenant's fixtures and other property therein at a valuation to be made by appraisers. Before fulfilment of the agreement, or delivery

of possession to the defendant, the greater part of the house and the property therein was consumed by fire. The plaintiff brought an action on the agreement, averring readiness to perform from the time of making the agreement and ever since, which was traversed by the defendant. It was held by the Court of Exchequer that by reason of the fire the plaintiff could not perform the agreement, and therefore could not maintain the action.

In Taylor *v.* Caldwell, 3 B. & S. 826, by a written contract one party agreed to give the other the use of a certain music hall on four specified days for the purpose of holding concerts, with no express stipulation for the event of its destruction by fire. The Court of Queen's Bench held that upon the destruction of the building on an earlier day, by an accidental fire, both parties were excused from the performance of the contract ; and, while recognizing as undoubted the rule that one who makes a positive contract to do a thing not in itself unlawful must perform it or pay damages for not doing so, declared it to be also well settled that that rule is only applicable where the contract is positive and absolute, and not subject to any condition, express or implied ; and that where, from the nature of the contract, it appears that the parties must from the beginning have contemplated the continuing existence of some particular specified thing as the foundation of what was to be done, there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the accidental perishing of the thing without the fault of either party.

The doctrine as there stated has been approved in the later English cases. Appleby *v.* Meyers, Law Rep. 1 C. P. 615 ; S. C. Law Rep. 2 C. P. 651 ; Boast *v.* Firth, Law Rep. 4 C. P. 1 ; Robinson *v.* Davison, Law Rep. 6 Exch. 269. And it is illustrated by the previous decisions of this Court, by which it has been held that a person who agrees to build a house on the land of another is not discharged by the destruction of the house by fire before its completion ; but that, where one agrees to repair another's house already built, such destruction of the house puts an end to the contract. Adams *v.* Nichols, 19 Pick. 275 ; Lord *v.* Wheeler, 1 Gray, 282.

In the present case, the agreement between the parties manifestly contemplates the conveyance of the buildings already upon the land as an important part of the subject-matter of the contract. It describes the property to be conveyed as the farm

occupied by the vendor and his father, and contains a provision that until the day appointed for the delivery of the deed no wood shall be cut and removed from the premises save firewood for use in the house. The vendor agrees to execute and deliver a proper deed for the conveying and assuring to the purchaser of the fee simple "of the said premises." The price stipulated to be paid is an entire sum; and the report states that it appeared in evidence at the trial that the estate at the time of the contract was worth at least that sum, and after the fire was not worth two thirds as much.

The case differs from those in which a lessee is held liable to pay rent or make repairs according to his covenants, notwithstanding the destruction of the buildings by fire or other accident during the term. There the lessor, by the execution and delivery of the lease, has fully performed the contract on his part; and the lessee, having thereby become the owner of the leasehold interest, must bear the same risk of fire or casualty as any other owner of property, and is not excused from performing his own express covenants. Fowler *v.* Bott, 6 Mass. 63; Kramer *v.* Cook, 7 Gray, 550; Leavitt *v.* Fletcher, 10 Allen, 119. But in the case at bar the defendant has only agreed to pay the purchase-money upon tender of a deed of the whole estate contracted for, including the buildings as well as the land; and, the buildings having been wholly destroyed by fire on the day before that appointed for the conveyance, the plaintiff did not and could not tender such a conveyance as he had agreed to make or as the defendant was bound to accept, and was not therefore entitled to maintain any action against the defendant upon the agreement.

It was contended at the argument that this defence was not open under the pleadings. But the declaration alleges that the plaintiff tendered to the defendant a good and proper deed for the conveying and assuring to the defendant the premises described in the agreement; and this allegation is met by a direct denial in the answer.

The result is, that the rulings of the Superior Court were erroneous, because inapplicable to the case, that there has been a mistrial, and that the verdict must be set aside and a new trial had.

TULLY *v.* HOWLING.

IN THE COURT OF APPEAL, JANUARY 22, 1877.

[*Reported in Law Reports* 2, *Queen's Bench Division*, 182.]

A CHARTERPARTY or agreement was, on March 4th, 1875, made between C. Tully, the plaintiff, and L. W. Howling, the defendant, the material part of which was as follows :

" It is this day mutually agreed between L. W. Howling, Esq., owner of the ship or vessel called the Conquest, of London, of the burden of 187 tons register admeasurement, or thereabouts, whereof William Sanson is master, now in Sunderland, bound to London, and Messrs. Charles Tully & Co., merchants and freighters of the said ship, for twelve months, for as many consecutive voyages as the said ship can enter upon after completion of the present voyage at and from Sunderland to London ; that the said ship being tight, stanch, and strong, and every way fitted for the voyage, the said master, with the said ship, shall, with the first opportunity, load a full and complete cargo of coals in river or dock, at an approved berth, drops, or staiths, and being so laden shall therewith proceed to London, or so near thereto as she can safely get, and deliver the same to the order of the said freighters or their assigns, he or they paying freight for the same at the rate of 7*s.* per ton."

After the voyage was completed, and when the plaintiff was ready to load the ship, she was, by order of the Board of Trade, detained as unseaworthy. The plaintiff refused to take the ship. The necessary repairs were not finished until more than two months after the voyage was completed. The plaintiff had brought an action against the defendant for a debt of £30. The defendant, admitting the debt of £30, set up a counterclaim for damages for not taking the ship, freights having in the meantime fallen.

The facts and dates are stated in detail in the judgment in the Court of Appeal.

At the trial a verdict was given for the defendant, damages £122, from which the £30 was to be deducted, leave being reserved to the plaintiff to move for judgment for £30.

The plaintiff moved accordingly in the Queen's Bench Division.

Waddy, *Q.C.*, and *Crompton* for the plaintiff.

R. E. Webster for the defendant.

COCKBURN, C.J. This case seems to my mind perfectly clear.

The cases cited by Webster have no application ; they were not cases in which the contract was one that had reference to a given time or to the use of the ship for a given time, and that is the essence of the present contract. The plaintiff says : " I want a vessel for twelve months from a given date," or, if you please, " from the termination of a given voyage." I think it is a matter of doubt which of those two is the right construction of the contract ; but taking it either way, what it comes to is this. The bargain is that the plaintiff is to have the use of the ship for twelve months, but the defendant is not in a position to give him the ship for twelve months from the date from which it was agreed the term should begin, whether it was a given date or the termination of a given voyage. He is not in a position to give him the use of the vessel, because she is in such a state that neither the owner nor the charterer would be justified in sending her to sea, and the defendant admits that to be the case, for he takes upon himself to repair the vessel. By the fact of his taking the vessel back on his own hands to repair, he makes it impossible for him to perform his part of the contract, which is, that the charterer shall have the use of the vessel for twelve months from a given period. Therefore, the result is, that if the charterer is to take the vessel at all he must take her not for twelve months, but for twelve months less two months. Therefore, it cannot be said that there was not a substantial deviation from the contract. I am of opinion that, under the circumstances, the plaintiff was perfectly justified in saying : " What I bargained for was the use of the ship for a consecutive series of voyages ; you cannot give me that, and I am not bound to go into the market to get some other ship and make some other bargain which may be advantageous or disadvantageous to me." I think these facts distinguish the case from those cited by Webster, in none of which was time of the essence of the contract.

Judgment for the plaintiff.[1]

The defendant appealed.

Philbrick, *Q.C.*, and *R. E. Webster* for the defendant.

The judgment of Kelly, C.B., Mellish, L.J., and Amphlett, J.A., was delivered by

MELLISH, L.J. This was an appeal from a judgment of the Queen's Bench Division ordering a verdict, which at the trial had been entered for the defendant on a counterclaim for £92, to be entered for the plaintiff for £30, pursuant to leave reserved. The defendant admitted that he owed the plaintiff the

[1] The concurring opinions of Mellor and Lush, JJ., have been omitted.—ED.

£30, and the only question in the cause was, whether the defendant, under the circumstances proved at the trial, was entitled to succeed on a counterclaim by which he sought to recover damages from the plaintiff on account of the plaintiff having refused to perform a charterparty he had entered into with the defendant. By this charterparty it was agreed that the defendant's vessel, the Conquest, then in the port of Sunderland, and bound for London, should be chartered to the plaintiff for twelve months for as many consecutive voyages between Sunderland and London as the said ship could enter upon after the completion of the then present voyage. The Conquest duly completed her then present voyage, and in March, 1875, returned to Sunderland. On April 8th the defendant gave notice to the plaintiff that on April 9th the Conquest would be ready to receive her cargo, and it was admitted in the argument before us that the year for which the Conquest was chartered began to run on April 9th. The plaintiff endeavored to procure a cargo for the Conquest, but for some time he was unable to procure one. He then determined to load the Conquest on his own account, and on April 20th gave notice to the master that he was ready to load. Before, however, any cargo was actually loaded, the officer of the Board of Trade objected to the vessel taking any cargo on board on account of her being unseaworthy, and on May 7th, a formal order was issued detaining the Conquest until she was repaired. Thereupon, the plaintiff, on May 9th, not being able to get the vessel, gave notice to the defendant that he rescinded the charter. The defendant proceeded without delay to repair the Conquest, and by June 17th she was repaired and ready to receive cargo, but the plaintiff refused to load her.

Under these circumstances it has been held by the Queen's Bench Division that the plaintiff was justified in rescinding the charter, and in refusing to load the Conquest, and we are of opinion that their judgment ought to be affirmed. It was admitted on the argument before us that the year for which the Conquest was chartered commenced on April 9th, and that the Conquest was not really ready to receive cargo, so that the plaintiff could have had the use of her, until June 17th ; and therefore the questions simply are, whether a person who has agreed to charter a vessel for twelve months, commencing from April 9th, is bound to wait until June 17th before he obtains possession of the vessel, and whether he is then bound to take her for a period of less than ten months ? In other words, in a charter for a stipulated time, is the time of the essence of the contract, or is the charterer bound to take the vessel for a time

substantially different from the time specified in the charter? We are of opinion that as in a charter for a voyage the specified voyage would be of the essence of the contract, and the charterer, if he could not have the use of the vessel for the specified voyage, would not be bound to take her for any other voyage, so in a charter for time, if the charterer cannot have the vessel for the specified time, he is not bound to take the vessel for a shorter time or a substantially different time, and if he cannot get the vessel for the specified time he may throw up the charter. In all contracts which are to be mutually performed the party who claims performance must be ready to perform his part of the contract, and cannot compel the opposite party to take something substantially different from that which was contracted to be given. If there is an agreement to sell 100 quarters of wheat, the purchaser is not bound to accept 90 quarters, though the price of wheat has fallen, and it is for his advantage to have the smaller quantity. He can say, "I never agreed to buy a quantity of 90 quarters, and therefore I will not take them." So in the present case the plaintiff can say, "I never agreed to charter the Conquest from June 17th, 1875, to April 9th, 1876, and therefore I will not take her for that period." Several cases were referred to, but the only case which related to time charters was Havelock *v.* Geddes.[1] In that case, however, it was admitted on the pleadings, as is repeatedly pointed out by Lord Ellenborough in his judgment, that the charterer had had the use of the ship, and that the action was brought to recover freight actually earned, and under those circumstances the Court no doubt held that it was no defence that the ship had not been repaired in due time before the commencement of the charter; but it was not held that a charterer who has chartered a vessel for twelve months is bound to accept the use of the vessel for a substantially different period, nor is any opinion expressed to that effect. The other cases which were cited seem to us to have no bearing on the subject.

BRETT, J. I agree; not on the ground that there is in such a charter a warranty that the ship should be seaworthy on the day when the charter is to commence, with a right to reject the ship if the warranty is not complied with, nor on the principle that time was of the essence of the contract, but on the ground that, under the circumstances proved at the trial, the jury might, and indeed should, in reason, have found that the ship was not fit for the purpose for which she was chartered, and could not be made fit within any time which would not have frustrated the object of the adventure.

Judgment affirmed.

[1] 10 East, 555.

NORRINGTON *v.* WRIGHT AND OTHERS.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER 26, 1885.

[*Reported in* 115 *United States Reports* 188.]

THIS was an action of *assumpsit*, brought by Arthur Norrington, a citizen of Great Britain, trading under the name of A. Norrington & Co., against James A. Wright and others, citizens of Pennsylvania, trading under the name of Peter Wright & Sons, upon the following contract :

"PHILADELPHIA, January 19, 1880.

"Sold to Messrs. Peter Wright & Sons, for account of A. Norrington & Co., London, five thousand (5000) tons old T iron rails, for shipment from a European port or ports, at the rate of about one thousand (1000) tons per month, beginning February, 1880, but whole contract to be shipped before August 1st, 1880, at forty-five dollars ($45) per ton of 2240 pounds custom-house weight, ex ship Philadelphia. Settlement cash on presentation of bills accompanied by custom-house certificate of weight. Sellers to notify buyers of shipments with vessels' names as soon as known by them. Sellers not to be compelled to replace any parcel lost after shipment. Sellers, when possible, to secure to buyers right to name discharging berth of vessels at Philadelphia.

"EDWARD J. ETTING,
"*Metal Broker.*"

The declaration contained three counts. The first count alleged the contract to have been for the sale of about 5000 tons of T iron rails, to be shipped at the rate of about 1000 tons a month, beginning in February, and ending in July, 1880. The second count set forth the contract *verbatim*. Each of these two counts alleged that the plaintiffs in February, March, April, May, June, and July shipped the goods at the rate of about 1000 tons a month, and notified the shipments to the defendants ; and further alleged the due arrival of the goods at Philadelphia, the plaintiff's readiness to deliver the goods and bills thereof, with custom-house certificates of weight, according to the contract, and the defendants' refusal to accept them. The third count differed from the second only in averring that 400 tons were shipped by the plaintiff in February and accepted by the defendants, and that the rest was shipped by the plaintiffs

at the rate of about 1000 tons a month in March, April, May, June, and July. The defendants pleaded *non assumpsit*. The material facts proved at the trial were as follows :

The plaintiff shipped from various European ports 400 tons by one vessel in the last part of February, 885 tons by two vessels in March, 1571 tons by five vessels in April, 850 tons by three vessels in May, 1000 tons by two vessels in June, and 300 tons by one vessel in July, and notified to the defendants each shipment.

The defendants received and paid for the February shipment upon its arrival in March, and in April gave directions at what wharves the March shipments should be discharged on their arrival ; but on May 14th, about the time of the arrival of the March shipments, and having been then for the first time informed of the amounts shipped in February, March, and April, gave Etting written notice that they should decline to accept the shipments made in March and April, because none of them were in accordance with the contract ; and, in answer to a letter from him of May 16th, wrote him on May 17th as follows : "We are advised that what has occurred does not amount to an acceptance of the iron under the circumstances and the terms of the contract. You had a right to deliver in parcels, and we had a right to expect the stipulated quantity would be delivered until the time was up in which that was possible. Both delivering and receiving were thus far conditional on there being thereafter a complete delivery in due time and of the stipulated article. On the assumption that this time had arrived, and that you have ascertained that you did not intend to, or could not, make any further deliveries for the February and March shipments, we gave you the notice that we declined accepting those deliveries. As to April, it is too plain, we suppose, to require any remark. If we are mistaken as to our obligation for the February and March shipments, of course we must abide the consequences ; but if we are right, you have not performed your contract, as you certainly have not for the April shipments. There is then the very serious and much debated question, as we are advised, whether the failure to make the stipulated shipments in February or March has absolved us from the contract. If it does, we of course will avail ourselves of this advantage."

On May 18th Etting wrote to the defendants, insisting on their liability for both past and future shipments, and saying, among other things : "In respect to the objection that there had not been a complete delivery in due time of the stipulated article, I beg to call your attention to the fact that while the contract is for 5000 tons, it expressly stipulates that deliveries

may be made during six months, and that they are only to be at the rate of about 1000 tons per month." "As to April, while it seems to me 'too plain to require any remark,' I do not see how it can seem so to you, unless you intend to accept the rails. If you object to taking all three shipments made in that month, I shall feel authorized to deliver only two of the cargoes, or, for that matter, to make the delivery of precisely 1000 tons. But I think I am entitled to know definitely from you whether you intend to reject the April shipments, and, if so, upon what ground, and also whether you are decided to reject the remaining shipments under the contract. You say in your last paragraph that you shall avail yourselves of the advantage, if you are absolved from the contract; but as you seem to be in doubt whether you can set up that claim or not, I should like to know definitely what is your intention."

On May 19th the defendants replied: "We do not read the contract as you do. We read it as stipulating for monthly shipments of about 1000 tons, beginning in February, and that the six months' clause is to secure the completion of whatever had fallen short in the five months. As to the meaning of 'about,' it is settled as well as such a thing can be; and certainly neither the February, March, nor April shipments are within the limits." "As to the proposal to vary the notices for April shipments, we do not think you can do this. The notice of the shipments, as soon as known, you were bound to give, and cannot afterward vary it if they do not conform to the contract. Our right to be notified immediately that the shipments were known is as material a provision as any other, nor can it be changed now in order to make that a performance which was no performance within the time required." "You ask us to determine whether we will or will not object to receive further shipments because of past defaults. We tell you we will if we are entitled to do so, and will not if we are not entitled to do so. We do not think you have the right to compel us to decide a disputed question of law to relieve you from the risk of deciding it yourself. You know quite as well as we do what is the rule and its uncertainty of application."

On June 10th Etting offered to the defendants the alternative of delivering to them 1000 tons strict measure on account of the shipments in April. This offer they immediately declined.

On June 15th Etting wrote to the defendants that two cargoes, amounting to 221 tons, of the April shipments, and two cargoes, amounting to 650 tons, of the May shipments (designated by the names of the vessels), had been erroneously notified to them, and that about 900 tons had been shipped by a

certain other vessel on account of the May shipments. On the same day the defendants replied that the notification as to April shipments could not be corrected at this late date, and after the terms of the contract had long since been broken.

From the date of the contract to the time of its rescission by the defendants, the market price of such iron was lower than that stipulated in the contract, and was constantly falling. After the arrival of the cargoes, and their tender and refusal, they were sold by Etting, with the consent of the defendants, for the benefit of whom it might concern.

At the trial the plaintiff contended, first, that under the contract he had six months in which to ship the 5000 tons, and any deficiency in the earlier months could be made up subsequently, provided that the defendants could not be required to take more than 1000 tons in any one month. Second, that if this was not so, the contract was a divisible contract, and the remedy of the defendants for a default in any month was not by rescission of the whole contract, but only by deduction of the damages caused by the delays in the shipments on the part of the plaintiff.

But the Court instructed the jury that if the defendants, at the time of accepting the delivery of the cargo paid for, had no notice of the failure of the plaintiff to ship about 1000 tons in the month of February, and immediately upon learning that fact gave notice of their intention to rescind, the verdict should be for them.

The plaintiff excepted to this instruction, and, after verdict and judgment for the defendants, sued out this writ of error.

Samuel Dickson and *J. C. Bullitt* for plaintiff in error.

Richard C. McMurtrie for defendants in error.

GRAY, J., delivered the opinion of the Court. After stating the facts in the language reported above, he continued :

In the contracts of merchants time is of the essence. The time of shipment is the usual and convenient means of fixing the probable time of arrival, with a view of providing funds to pay for the goods, or of fulfilling contracts with third persons. A statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty, in the sense in which that term is used in insurance and maritime law—that is to say, a condition precedent, upon the failure or non-performance of which the party aggrieved may repudiate the whole contract. Behn *v.* Burness, 3 B. & S. 751 ; Bowes *v.* Shand, 2 App. Cas. 455 ; Lowber *v.* Bangs, 2 Wall. 728 ; Davison *v.* Von Lingen, 113 U. S. 40.

The contract sued on is a single contract for the sale and purchase of 5000 tons of iron rails, shipped from a European port or ports for Philadelphia. The subsidiary provisions as to shipping in different months, and as to paying for each shipment upon its delivery, do not split up the contract into as many contracts as there shall be shipments or deliveries of so many distinct quantities of iron. Mersey Co. *v.* Naylor, 9 App. Cas. 434, 439. The further provision, that the sellers shall not be compelled to replace any parcel lost after shipment, simply reduces, in the event of such a loss, the quantity to be delivered and paid for.

The times of shipment, as designated in the contract, are "at the rate of about 1000 tons per month, beginning February, 1880, but whole contract to be shipped before August 1st, 1880." These words are not satisfied by shipping one-sixth part of the 5000 tons, or about 833 tons, in each of the six months which begin with February and end with July. But they require about 1000 tons to be shipped in each of the five months from February to June inclusive, and allow no more than slight and unimportant deficiencies in the shipments during those months to be made up in the month of July. The contract is not one for the sale of a specific lot of goods, identified by independent circumstances, such as all those deposited in a certain warehouse, or to be shipped in a particular vessel, or that may be manufactured by the seller, or may be required for use by the buyer, in a certain mill, in which case the mention of the quantity, accompanied by the qualification of "about," or "more or less," is regarded as a mere estimate of the probable amount, as to which good faith is all that is required of the party making it. But the contract before us comes within the general rule: "When no such independent circumstances are referred to, and the engagement is to furnish goods of a certain quality or character to a certain amount, the quantity specified is material, and governs the contract. The addition of the qualifying words 'about,' 'more or less,' and the like, in such cases, is only for the purpose of providing against accidental variations, arising from slight and unimportant excesses or deficiencies in number, measure, or weight." Brawley *v.* United States, 96 U. S. 168, 171–172.

The seller is bound to deliver the quantity stipulated, and has no right either to compel the buyer to accept a less quantity, or to require him to select part out of a greater quantity; and when the goods are to be shipped in certain proportions monthly, the seller's failure to ship the required quantity in the first month gives the buyer the same right to rescind the whole

contract that he would have had if it had been agreed that all the goods should be delivered at once.

The plaintiff, instead of shipping about 1000 tons in February and about 1000 tons in March, as stipulated in the contract, shipped only 400 tons in February, and 885 tons in March. His failure to fulfil the contract on his part in respect to these first two instalments justified the defendants in rescinding the whole contract, provided they distinctly and seasonably asserted the right of rescission.

The defendants, immediately after the arrival of the March shipments, and as soon as they knew that the quantities which had been shipped in February and in March were less than the contract called for, clearly and positively asserted the right to rescind, if the law entitled them to do so. Their previous acceptance of the single cargo of 400 tons shipped in February was no waiver of this right, because it took place without notice, or means of knowledge, that the stipulated quantity had not been shipped in February. The price paid by them for that cargo being above the market value, the plaintiff suffered no injury by the omission of the defendants to return the iron; and no reliance was placed on that omission in the correspondence between the parties.

The case wholly differs from that of Lyon *v.* Bertram, 20 How. 149, in which the buyer of a specific lot of goods accepted and used part of them with full means of previously ascertaining whether they conformed to the contract.

The plaintiff, denying the defendants' right to rescind, and asserting that the contract was still in force, was bound to show such performance on his part as entitled him to demand performance on their part, and, having failed to do so, cannot maintain this action.

For these reasons, we are of opinion that the judgment below should be affirmed. But as much of the argument at the bar was devoted to a discussion of the recent English cases, and as a diversity in the law, as administered on the two sides of the Atlantic, concerning the interpretation and effect of commercial contracts of this kind, is greatly to be deprecated, it is proper to add that upon a careful examination of the cases referred to they do not appear to us to establish any rule inconsistent with our conclusion.

In the leading case of Hoare *v.* Rennie, 5 H. & N. 19, which was an action upon a contract of sale of 667 tons of bar iron, to be shipped from Sweden in June, July, August, and September, and in about equal portions each month, at a certain price payable on delivery, the declaration alleged that the plaintiffs per-

formed all things necessary to entitle them to have the contract performed by the defendants, and were ready and willing to perform the contract on their part, and in June shipped a certain portion of the iron, and within a reasonable time afterward offered to deliver to the defendants the portion so shipped, but the defendants refused to receive it, and gave notice to the plaintiffs that they would not accept the rest. The defendants pleaded that the shipment in June was of about 20 tons only, and that the plaintiffs failed to complete the shipment for that month according to the contract. Upon demurrer to the pleas, it was argued for the plaintiffs that the shipment of about one fourth of the iron in each month was not a condition precedent, and that the defendants' only remedy for a failure to ship that quantity was by a cross action. But judgment was given for the defendants, Pollock, C.B., saying: "The defendants refused to accept the first shipment, because, as they say, it was not a performance, but a breach of the contract. Where parties have made an agreement for themselves, the courts ought not to make another for them. Here they say that in the events that have happened one fourth shall be shipped in each month, and we cannot say that they meant to accept any other quantity. At the outset, the plaintiffs failed to tender the quantity according to the contract; they tendered a much less quantity. The defendants had a right to say that this was no performance of the contract, and they were no more bound to accept the short quantity than if a single delivery had been contracted for. Therefore the pleas are an answer to the action." 5 H. & N. 28. So in Coddington *v.* Paleologo, L. R. 2 Ex. 193, while there was a division of opinion upon the question whether a contract to supply goods "delivering on April 17th, complete May 8th," bound the seller to begin delivering on April 17th, all the judges agreed that if it did, and the seller made no delivery on that day, the buyer might rescind the contract.

On the other hand, in Simpson *v.* Crippin, L. R. 8 Q. B. 14, under a contract to supply from 6000 to 8000 tons of coal, to be taken by the buyer's wagons from the seller's colliery in equal monthly quantities for twelve months, the buyer sent wagons for only 150 tons during the first month; and it was held that this did not entitle the seller to annul the contract and decline to deliver any more coal, but that his only remedy was by an action for damages. And in Brandt *v.* Lawrence, 1 Q. B. D. 344, in which the contract was for the purchase of 4500 quarters, 10 per cent more or less, of Russian oats, "shipment by steamer or steamers during February," or, in case of ice preventing shipment, then immediately upon the opening

of navigation, and 1139 quarters were shipped by one steamer in time, and 3361 quarters were shipped too late, it was held that the buyer was bound to accept the 1139 quarters, and was liable to an action by the seller for refusing to accept them.

Such being the condition of the law of England as declared in the lower courts, the case of Bowes *v.* Shand, after conflicting decisions in the Queen's Bench Division and the Court of Appeal, was finally determined by the House of Lords. 1 Q. B. D. 470 ; 2 Q. B. D. 112 ; 2 App. Cas. 455.

In that case two contracts were made in London, each for the sale of 300 tons of "Madras rice, to be shipped at Madras or coast, for this port, during the months of March $\frac{\text{and}}{\text{or}}$ April, 1874, per Rajah of Cochin." The 600 tons filled 8200 bags, of which 7120 bags were put on board and bills of lading signed in February ; and for the rest, consisting of 1030 bags put on board in February, and 50 in March, the bill of lading was signed in March. At the trial of an action by the seller against the buyer for refusing to accept the cargo, evidence was given that rice shipped in February would be the spring crop, and quite as good as rice shipped in March or April. Yet the House of Lords held that the action could not be maintained, because the meaning of the contract, as apparent upon its face, was that all the rice must be put on board in March and April, or in one of those months.

In the opinions there delivered the general principles underlying this class of cases are most clearly and satisfactorily stated. It will be sufficient to quote a few passages from two of those opinions.

Cairns, L.C., said : "It does not appear to me to be a question for your Lordships, or for any court, to consider whether that is a contract which bears upon the face of it some reason, some explanation, why it was made in that form, and why the stipulation is made that the shipment should be during these particular months. It is a mercantile contract, and merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance." 2 App. Cas. 463. "If it be admitted that the literal meaning would imply that the whole quantity must be put on board during a specified time, it is no answer to that literal meaning, it is no observation which can dispose of, or get rid of, or displace, that literal meaning, to say that it puts an additional burden on the seller, without a corresponding benefit to the purchaser ; that is a matter of which the seller and the purchaser are the best judges. Nor is it any reason for saying that it would be a means by which purchasers, without any real

cause, would frequently obtain an excuse for rejecting contracts when prices had dropped. The non-fulfilment of any term in any contract is a means by which a purchaser is able to get rid of the contract when prices have dropped ; but that is no reason why a term which is found in a contract should not be fulfilled." Pp. 465–466. " It was suggested that even if the construction of the contract be as I have stated, still if the rice was not put on board in the particular months, that would not be a reason which would justify the appellants in having rejected the rice altogether, but that it might afford a ground for a cross action by them if they could show that any particular damage resulted to them from the rice not having been put on board in the months in question. My Lords, I cannot think that there is any foundation whatever for that argument. If the construction of the contract be as I have said, that it bears that the rice is to be put on board in the months in question, that is part of the description of the subject-matter of what is sold. What is sold is not 300 tons of rice in gross or in general. It is 300 tons of Madras rice to be put on board at Madras during the particular months." " The plaintiff, who sues upon that contract, has not launched his case until he has shown that he has tendered that thing which has been contracted for, and if he is unable to show that, he cannot claim any damages for the non-fulfilment of the contract." Pp. 467–468.

Lord Blackburn said : " If the description of the article tendered is different in any respect, it is not the article bargained for, and the other party is not bound to take it. I think in this case what the parties bargained for was rice, shipped at Madras or the coast of Madras. Equally good rice might have been shipped a little to the north or a little to the south of the coast of Madras. I do not quite know what the boundary is, and probably equally good rice might have been shipped in February as was shipped in March, or equally good rice might have been shipped in May as was shipped in April, and I dare say equally good rice might have been put on board another ship as that which was put on board the Rajah of Cochin. But the parties have chosen, for reasons best known to themselves, to say : ' We bargain to take rice, shipped in this particular region, at that particular time, on board that particular ship ;' and before the defendants can be compelled to take anything in fulfilment of that contract it must be shown not merely that it is equally good, but that it is the same article as they have bargained for, otherwise they are not bound to take it." 2 App. Cas. 480–481.

Soon after that decision of the House of Lords, two cases

were determined in the Court of Appeal. In Reuter *v.* Sala, 4 C. P. D. 239, under a contract for the sale of "about 25 tons (more or less) black pepper, October and or November shipment, from Penang to London, the name of the vessel or vessels, marks and full particulars to be declared to the buyer in writing within sixty days from date of bill of lading," the seller, within the sixty days, declared 25 tons by a particular vessel, of which only 20 tons were shipped in November, and 5 tons in December; and it was held that the buyer had the right to refuse to receive any part of the pepper. In Honck *v.* Muller, 7 Q. B. D. 92, under a contract for the sale of 2000 tons of pig iron, to be delivered to the buyer free on board at the maker's wharf "in November, or equally over November, December, and January next," the buyer failed to take any iron in November, but demanded delivery of one third in December and one third in January; and it was held that the seller was justified in refusing to deliver, and in giving notice to the buyer that he considered the contract as cancelled by the buyer's not taking any iron in November.

The plaintiff in the case at bar greatly relied on the very recent decision of the House of Lords in Mersey Co. *v.* Naylor, 9 App. Cas. 434, affirming the judgment of the Court of Appeal in 9 Q. B. D. 648, and following the decision of the Court of Common Pleas in Freeth *v.* Burr, L. R. 9 C. P. 208.

But the point there decided was that the failure of the buyer to pay for the first instalment of the goods upon delivery does not, unless the circumstances evince an intention on his part to be no longer bound by the contract, entitle the seller to rescind the contract and to decline to make further deliveries under it. And the grounds of the decision, as stated by Selborne, L.C., in moving judgment in the House of Lords, are applicable only to the case of a failure of the buyer to pay for, and not to that of a failure of the seller to deliver the first instalment.

The Lord Chancellor said: "The contract is for the purchase of 5000 tons of steel blooms of the company's manufacture; therefore it is one contract for the purchase of that quantity of steel blooms. No doubt there are subsidiary terms in the contract, as to the time of delivery, 'Delivery 1000 tons monthly commencing January next;' and as to the time of payment, 'Payment net cash within three days after receipt of shipping documents;' but that does not split up the contract into as many contracts as there shall be deliveries for the purpose, of so many distinct quantities of iron. It is quite consistent with the natural meaning of the contract, that it is to be one contract for the purchase of that quantity of iron to be

delivered at those times and in that manner, and for which payment is so to be made. It is perfectly clear that no particular payment can be a condition precedent of the entire contract, because the delivery under the contract was most certainly to precede payment ; and that being so, I do not see how, without express words, it can possibly be made a condition precedent to the subsequent fulfilment of the unfulfilled part of the contract by the delivery of the undelivered steel." 9 App. Cas. 439.

Moreover, although in the Court of Appeal *dicta* were uttered tending to approve the decision in Simpson *v.* Crippin, and to disparage the decisions in Hoare *v.* Rennie and Honck *v.* Muller, above cited, yet in the House of Lords Simpson *v.* Crippin was not even referred to, and Lord Blackburn, who had given the leading opinion in that case, as well as Lord Bramwell, who had delivered the leading opinion in Honck *v.* Muller, distinguished Hoare *v.* Rennie and Honck *v.* Muller from the case in judgment. 9 App. Cas. 444, 446.

Upon a review of the English decisions the rule laid down in the earlier cases of Hoare *v.* Rennie and Coddington *v.* Paleologo, as well as in the later cases of Reuter *v.* Sala and Honck *v.* Muller, appears to us to be supported by a greater weight of authority than the rule stated in the intermediate cases of Simpson *v.* Crippin and Brandt *v.* Lawrence, and to accord better with the general principles affirmed by the House of Lords in Bowes *v.* Shand, while it in nowise contravenes the decision of that tribunal in Mersey Co. *v.* Naylor.

In this country there is less judicial authority upon the question. The two cases most nearly in point, that have come to our notice, are Hill *v.* Blake, 97 N. Y. 216, which accords with Bowes *v.* Shand, and King Philip Mills *v.* Slater, 12 R. I. 82, which approves and follows Hoare *v.* Rennie. The recent cases in the Supreme Court of Pennsylvania, cited at the bar, support no other conclusion. In Shinn *v.* Bodine, 60 Penn. St. 182, the point decided was that a contract for the purchase of 800 tons of coal at a certain price per ton, " coal to be delivered on board vessels as sent for during months of August and September," was an entire contract, under which nothing was payable until delivery of the whole, and therefore the seller had no right to rescind the contract upon a refusal to pay for one cargo before that time. In Morgan *v.* McKee, 77 Penn. St. 228, and in Scott *v.* Kittanning Coal Co., 89 Penn. St. 231, the buyer's right to rescind the whole contract upon the failure of the seller to deliver one instalment was denied, only because that right had been waived, in the one case by unreasonable delay in

asserting it, and in the other by having accepted, paid for, and used a previous instalment of the goods. The decision of the Supreme Judicial Court of Massachusetts in Winchester *v.* Newton, 2 Allen, 492, resembles that of the House of Lords in Mersey Co. *v.* Naylor.

Being of opinion that the plaintiff's failure to make such shipments in February and March as the contract required prevents his maintaining this action, it is needless to dwell upon the further objection that the shipments in April did not comply with the contract, because the defendants could not be compelled to take about 1000 tons out of the larger quantity shipped in that month, and the plaintiff, after once designating the names of vessels, as the contract bound him to do, could not substitute other vessels. See Busk *v.* Spence, 4 Camp. 329; Graves *v.* Legg, 9 Exch. 709; Reuter *v.* Sala, above cited.

Judgment affirmed.

The Chief Justice was not present at the argument, and took no part in the decision of this case.

CLARENCE H. CLARK ET AL., APPELLANTS, *v.* ANN FEY, AS ADMINISTRATRIX, ETC., RESPONDENT.

IN THE COURT OF APPEALS OF NEW YORK, JUNE 3, 1890.

[*Reported in* 121 *New York Reports* 470.]

APPEAL from judgment of the General Term of the Supreme Court in the First Judicial Department, entered upon an order made January 28th, 1889, which affirmed a judgment in favor of defendant entered upon a decision of the Court on trial at circuit.

This action was brought to recover damages for an alleged breach of a written contract for the sale by plaintiffs to John Fey, defendant's intestate, of 500 tons of "old iron 'T' rails," at $37.50 per ton.

The terms of the contract as to delivery and payment were as follows:

"Delivery. Shipment from the other side January or February or March, Seller's option.

"Payment. Thirty-two (32.50) Dollars and fifty cents cash according to invoice weights on handing order on vessels, balance on handing weighmaster's return."

The facts, so far as material, are stated in the opinion.

Treadwell Cleveland for appellants.

John E. Parsons and *Albert G. McDonald* for respondent.

FINCH, J. It is not disputed that the rails, which were finally tendered to the vendee and then sold for his account and risk, producing a deficiency below the contract price, which deficiency forms the subject of the action, were not the rails which the vendee bought and the vendors sold. By the original written contract those rails were to be 500 tons shipped "from the other side, January or February or March, seller's option." It is the settled rule that, in a case like the present, the date of the shipment is a material element in the identification of the property. Hill *v.* Blake, 97 N. Y. 216; Tobias *v.* Lissberger, 105 N. Y. 404. It was not 500 tons of rails generally that were the subject of the contract, but a specific quantity shipped from the other side during the three named months, and unless such were tendered the contract was not performed. The offer of other rails would impose no obligation upon the purchaser. It is clear, therefore, that the tender finally made was not of the property specified in the contract, and left no liability upon the vendee resulting from his refusal to accept, unless there is something else about the case.[1]

We discover no ground upon which the judgment can be deemed erroneous, and it should be affirmed, with costs.

All concur.

Judgment affirmed.

PAUL GERLI, PLAINTIFF AND DEFENDANT IN ERROR, *v.* THE POIDEBARD SILK MANUFACTURING COMPANY, PLAINTIFF AND DEFENDANT IN ERROR.

IN THE COURT OF ERRORS AND APPEALS OF NEW JERSEY, NOVEMBER TERM, 1894.

[*Reported in* 57 *New Jersey Law Reports* 432.]

ON error to the Hudson Circuit. The two writs of error were heard together.

Charles L. Carrick and *Charles E. Hughes* for Paul Gerli, plaintiff in error.

Collins and *Corbin* for the Poidebard Silk Manufacturing Company, defendant in error.

The opinion of the Court was delivered by

DIXON, J. On March 28th, 1893, C. & E. Gerli, Fratelli & Company, entered into a contract to sell and deliver in New York, to the Poidebard Silk Manufacturing Company, thirty

[1] Only so much of the opinion is given as relates to this question.—ED.

bales of extra Piva new silk, deliverable, ten bales July 20th to 25th, ten bales August 15th, and ten bales September 1st to 10th, each instalment to be paid for sixty days after delivery, at $5.90 per pound. In consequence of the lateness of the new crop it was impossible for the sellers to make delivery of the first ten bales within the time specified, and on July 27th the buyer extended the time for such delivery until August 1st. On that date, the impossibility still continuing, the buyer notified the sellers that it cancelled the contract because of the default and would decline to receive any of the merchandise ordered. On August 15th the new crop of silk had not yet arrived in New York, but it arrived before September 10th. Under these circumstances one of the members of the selling firm assigned the firm's rights in the contract to Paul Gerli, the plaintiff, and thereupon he brought this suit against the buyer to recover damages arising from the refusal to accept the instalments of August 15th and September 1st to 10th. At the trial the justice denied the right to damages for the instalment of August 15th, and directed a recovery of the damages as to the instalment of September 1st to 10th. On exceptions taken at the trial each party has assigned error.

The errors assigned by the purchaser will first be considered :

Third, the other exception pressed by the defendant below is that the trial justice denied the right of the buyer to rescind the contract on the non-delivery of the first instalment of silk.[1]

The general rule on this subject was thus laid down by this Court in Blackburn *v.* Reilly, 18 Vroom, 290 : "In contracts for the sale of goods, to be executed by a series of deliveries and payments, defaults of either party, with reference to one or more of the stipulated acts, will not ordinarily discharge the other party from his obligation, unless the conduct of the party in default be such as to evince an intention to abandon the contract or a design no longer to be bound by its terms."

In the case cited, this rule was enforced against the buyer. In Trotter *v.* Heckscher, 13 Stew. Eq. 612, this Court, and in Otis *v.* Adams, 27 Vroom, 38, the Supreme Court, enforced it against the seller.

That the conduct of the vendors in the present case did not evince an intention to abandon the contract or not to be bound by its terms, appears beyond dispute. They failed to deliver the July instalment because it was impossible to do so, offered to deliver other silk which they considered equally valuable, expressed their willingness to come to an equitable arrangement for their default, and, on the first intimation of a purpose on

[1] Only so much of the opinion is given as relates to this exception.—ED.

the part of the vendee to rescind the contract, they protested against the right of rescission, and insisted that they should be permitted to make the subsequent deliveries. They showed a design the very opposite of repudiation.

Nor do we find anything in this contract or the circumstances of the parties from which it can reasonably be inferred that the parties intended the delivery of each instalment of silk to be a condition precedent to the continuing obligation of the contract. So far as appears, the usefulness to the buyer of any instalment did not at all depend upon the prompt delivery of prior instalments, and full indemnity for every default could be secured by action based thereon. So that, under the rule before declared, it would seem that the attempt to rescind was illegal.

The defendant, however, insists that the rule is not applicable to the present case, because the sellers' fault consisted in failing to do the first thing required to be done in performance of the contract, and Norrington *v.* Wright, 115 U. S. 188, is cited as an authority for this distinction.

On principle, I do not see that, for such a purpose, the first act to be done stands upon a different footing from subsequent acts. A default in that does not make it more certain than do other defaults that the party aggrieved cannot get exactly what he contracted for ; for that default, as well as for others, he may be compensated by suit, and by that default, as readily as by others, he may obtain an unconscionable advantage if he is entitled to rescind or retain the bargain as self-interest may dictate. As evidence of repudiation or abandonment, non-performance of the first thing required to be done may be more persuasive than if the promisor had partially carried out his contract, but, as a basis on which a right of rescission is to be supported, it cannot, merely because it is first in order of time, have any greater importance than later defaults.

In Norrington *v.* Wright, *ubi supra*, the plaintiff had contracted to ship from Europe to the defendant, in Philadelphia, 1000 tons of rails in each of the months of February, March, April, May, and June. In February he had shipped 400 tons which the defendant had received and paid for, not knowing that less than the required quantity had been shipped. In March the plaintiff had shipped 885 tons, and the defendant, on learning of these deficiencies, declared the contract terminated. The Court held that he was justified in doing so.

I am not sure that I perceive definitely the principle on which this decision was rested. But the case seems now to be cited for the following paragraph in the opinion of the Court : " The

seller is bound to deliver the quantity stipulated, and has no right . . . to compel the buyer to accept a less quantity ; . . . and when the goods are to be shipped in certain proportions monthly, the seller's failure to ship the required quantity in the first month gives the buyer the same right to rescind the whole contract that he would have had if it had been agreed that all the goods should be delivered at once."

I cannot but think that there is here some confusion of thought. If a contract of sale requires the delivery of all the goods at once, and the seller tenders only part at the time specified, certainly the buyer may refuse to accept the part, but it is scarcely accurate to say his refusal is based upon a rescission of the contract. He has simply refused to do what he never agreed to do. But if the goods are to be delivered in instalments at different times and the seller tenders one instalment on the day specified, then if the buyer refuses to accept it, plainly his refusal must rest upon a different foundation. He had agreed to accept such a tender, and his refusal can be justified only on the idea that he has become released from that agreement ; that is to say, with reference to the point we are now considering, it must appear that his agreement to accept the instalment tendered was dependent on the due performance by the seller of another promise which he had failed to perform. We are thus brought to the real question in all bargains of this nature, whether on the proper construction of the contract the performance of any particular stipulation by one party is a condition precedent to the continuance of obligation upon the other party, and logically this must be the question as well with regard to the first stipulation as the subsequent ones.

On this question this Court adopted the general rule that, when the seller has agreed to deliver the goods sold in instalments, and the buyer has agreed to pay the price in instalments which are proportioned to and payable on the delivery of each instalment of goods, then default by either party with reference to any one instalment will not ordinarily entitle the other party to abrogate the contract. We were led to the adoption of this rule because it seemed to be supported by the greater strength of judicial authority and to be most likely to promote justice. We see no sufficient reason for abandoning it.

The rule governs the case in hand and maintains the right of the plaintiff to recover damages for the defendant's refusal to accept the third instalment of silk. Therefore, as against the defendant, the judgment is not erroneous.

The judgment should be affirmed.

In case of Gerli *v.* Poidebard Silk Manufacturing Company :

For affirmance : THE CHANCELLOR, DIXON, C.J., GARRISON, MAGIE, REED, VAN SYCKEL, BOGERT, BROWN, KRUEGER, SIMS, SMITH. 12.

For reversal : None.

In case of Poidebard Silk Manufacturing Co. *v.* Gerli :

For affirmance : THE CHANCELLOR, DIXON, C.J., GARRISON, BOGERT, BROWN, KRUEGER, SIMS, SMITH. 9.

For reversal : MAGIE, REED, VAN SYCKEL. 3.[1]

BOONE *v.* EYRE.

IN THE KING'S BENCH, EASTER TERM, 1776.

[*In* 1 *Henry Blackstone* 273, *note a.*]

COVENANT on a deed, whereby the plaintiff conveyed to the defendant the equity of redemption of a plantation in the West Indies, together with the stock of negroes upon it, in consideration of £500 and an annuity of £160 per annum for his life ; and covenanted that he had a good title to the plantation, was lawfully possessed of the negroes, and that the defendant should quietly enjoy. The defendant covenanted that the plaintiff well and truly performing all and everything therein contained on his part to be performed, he, the defendant, would pay the annuity. The breach assigned was the non-payment of the annuity. Plea : that the plaintiff was not at the time of making the deed legally possessed of the negroes on the plantation, and so had not a good title to convey.

To which there was a general demurrer.

Lord MANSFIELD. The distinction is very clear, where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent. If this plea were to be allowed, any one negro not being the property of the plaintiff would bar the action.

Judgment for the plaintiff.

[1] The dissenting opinion of Van Syckel, J., has been omitted.—ED.

RITCHIE *v.* ATKINSON.

IN THE KING'S BENCH, NOVEMBER 15, 1808.

[*Reported in* 10 *East* 295.]

THIS was an action of *indebitatus assumpsit* for the freight of goods conveyed in the ship Adelphi, of which the plaintiff was the master, from St. Petersburg to London, and delivered to the defendant or his order. There was also a count on a *quantum meruit* for freight, and the common counts for work and labor, and for money paid, etc. The defendant pleaded the general issue ; and at the trial at Guildhall before Lord Ellenborough, C.J., a verdict was found for the plaintiff for £960 15*s*. subject to the opinion of this Court on the following case.

The plaintiff being master of the ship Adelphi, in August, 1807, chartered her to the defendant by the following instrument : "Memorandum for charter. London, August 12th, 1807. It is this day mutually agreed between Captain J. Ritchie, of the ship Adelphi, burden 400 tons or thereabouts, now in the river, and W. Atkinson, of London, merchant, that the said ship, being tight, and every way fitted for the voyage, shall with all convenient speed sail and proceed to St. Petersburg, or so near thereunto as she may safely get, and there load from the factors of Wm. Atkinson, a complete cargo of clean hemp, and 80 tons of iron for ballast, not exceeding what she can reasonably stow, etc.; and being so loaded shall therewith proceed to Woolwich and London, and deliver the same, on being paid freight for clean hemp £5 per ton, for ballast iron 5*s*. per ton, with two-thirds port charges and pilotage as customary ; restraint of princes and rulers during the said voyage always excepted : one half of the freight to be paid on unloading and right delivery of the cargo, and the remainder in three months following. Thirty running days are to be allowed the said merchant (if the ship is not sooner dispatched), for loading her at St. Petersburg, and thirty running days for delivery at Woolwich and London, and ten days on demurrage over and above the said laying days at £6 per day. Penalty for non-performance of this agreement £2000. The ship to sail with convoy from the Sound for England. Wm. Atkinson." The Adelphi sailed in ballast from Deptford on August 24th, 1807, and arrived at Cronstadt, the port of St. Petersburg, on September 16th following ; where the plaintiff proceeded to take in her cargo under the charter-party, and

continued loading her with all due diligence until September 25th, and had then taken on board between 70 and 80 tons of iron for ballast, the same being a sufficient quantity for ballast, and a considerable quantity of hemp. On September 25th there was a general rumor of an embargo being intended to be laid by the Russian Government on all British vessels ; and there was every appearance that it would take place immediately ; but it did not in fact take place then, nor until six weeks afterward ; but on September 25th, Mr. Booker, the agent for the British factory at Cronstadt, and also the agent to the house of Hubbard & Co., the defendant's agents, in consequence of instructions that he had received from Sir Stephen Shairp, his Majesty's Consul General at St. Petersburg, desired the captains of such British vessels as were ready to proceed to sea to do so as soon as possible, as he expected an embargo might take place immediately. (The case then set out a circular letter of advice to that effect, written to the captains of British vessels by the consul's agents.) In consequence of which the plaintiff gave directions to leave off screwing down any more hemp, which is the usual mode of loading, and to fill the ship up as fast as possible by hand ; and the whole of this day was occupied in loading the vessel in this manner till 6 o'clock ; at which time she was filled up as far as could be done by hand ; and the ship sailed on the evening of September 25th with a cargo more than half what she could have carried, though there was at the time as much hemp of the defendant's lying in lighters alongside of the vessel as would have completely loaded her. The plaintiff acted *bona fide* and as an honest man under the existing circumstances, and there was a reasonable and well-grounded apprehension for his acting as he did ; and he brought home as complete a cargo as he could under the circumstances. Several other vessels sailed the same evening as the Adelphi. All or almost all the vessels which had passes sailed either the same evening or the next morning without full cargoes, under the apprehensions of an embargo ; but some other British vessels did not sail from Cronstadt at that time, and were not detained, but completed their loading ; and if the Adelphi had stayed, she might have completed her loading. The plaintiff sailed without any previous communication with Hubbard & Co., the defendant's agents, to whom he was addressed ; they residing at St. Petersburg. As soon as they had notice of the circumstances they immediately came to Cronstadt with an intention to stop the ship, but it was too late ; and they then formally protested against him for breach of his charter-party. The Adelphi arrived in London and

delivered her cargo there to the defendant, who refused to pay the freight, as little more than a moiety of the quantity of hemp stipulated by the charter-party was brought by the plaintiff. The freight of the iron and hemp so brought to London and delivered to the defendant amounted, according to the rate stipulated in the charter-party, to £960 15*s*. And the verdict for that sum was to stand, if the Court thought that the plaintiff was entitled to recover; otherwise, a nonsuit was to be entered.

Littledale contended for the plaintiff.

Taddy, *contra*.

Lord ELLENBOROUGH, C.J. If the delivery of a complete cargo were a condition precedent to the recovery of any freight, no doubt the defendant would be entitled to require the strictest performance of it; but the question is, Whether it be a condition precedent? and that depends not on any formal arrangement of the words, but on the reason and sense of the thing, as it is to be collected from the whole contract: whether of two things reciprocally stipulated to be done, the performance of the one does in sense and reason depend upon the performance of the other.[1] Here is a ship of about 400 tons, which is freighted to go to St. Petersburg, and to bring home a complete cargo of hemp and iron, and to deliver the same on being paid freight at so much per ton on each commodity. If the owner be not entitled to recover freight for any proportion of goods he may bring home short of a complete cargo, and it should appear by any subsequent admeasurement of the vessel, even after the delivery of the cargo, that there was wanting some small fraction of a complete cargo; if the ship had been supposed to measure 400 tons, and a cargo adapted to that proportion had been loaded, and it turned out that she measured 10 or 20 tons more; the owner would altogether be defeated of his remedy for the whole freight. But would not such a construction be contrary to common sense and the true nature of such a contract; and can any such meaning be fairly inferred from the terms of it? But it is said that a different construction will bear hard upon the merchant who has stipulated for the delivery of a complete cargo. It does not follow, however, from thence, that if there has been an imperfect delivery, he will be ousted of his remedy: for clearly an action on the case lies against the captain who has made an imperfect, when he could have made a perfect delivery. But I should require the strongest authority to be adduced before I held that this was a

[1] A portion of the opinion referring to Boone *v.* Eyre has been omitted.—ED.

condition precedent, when the consequences of such a construction would be such as I have before stated. There is no case, however, where the delivery of less than a complete cargo has been held not to be apportionable. Where as in Smith *v.* Wilson,[1] the freight is made payable upon an indivisible condition, such as in that case the arrival of the ship with her cargo at her destined port of discharge ; such arrival, etc., must be a condition precedent ; because it is incapable of being apportioned ; but here the delivery of the cargo is in its nature divisible, and, therefore, I think it is not a condition precedent ; but the plaintiff is entitled to recover freight in proportion to the extent of such delivery ; leaving the defendant to his remedy in damages for the short delivery. And all the cases of conditions precedent have been where the thing to be done was a strict indivisible condition. The same may be said of the case of the five ships mentioned from Malynes, which were freighted out to Leghorn and Civita Vecchia, there to remain a certain time and take in their lading and return home ; and some of them came away without any lading, before the precise time stipulated for their abiding there to be laden had expired. In this case, however, the condition is divisible, and the real justice of the case will be attained by the plaintiff's recovering his freight in the proportion per ton of the goods delivered ; and the remedy of the defendant will still be entire to punish the master for his imperfect and wrongful delivery.

Grose, J. It is not a condition precedent to the claim of freight that a complete cargo should be delivered. The agreement, however, does contain a condition precedent in one part ; for the payment of the freight is made a condition precedent to the delivery of the cargo ; the master being to "deliver the same on being paid freight." This is strong to show that the parties knew how to make a condition precedent where it was so intended ; but they have not done so in the instance now in question. And to construe the delivery of a complete cargo to be a condition precedent to the right to recover any freight would be manifestly unjust ; because if default were made in ever so small a proportion of that which would be a complete cargo, the master would not be entitled to any freight for however large a proportion of goods he may have delivered. The reasonable construction therefore is, that the plaintiff should receive freight according to the quantity per ton which he has delivered. But it is said that the intention of the parties was that the defendant should receive a complete cargo, as much as could be stowed in the ship ; and that this was a

[1] 8 East, 437.

material stipulation to be performed for his benefit. I will not say now that it was not so ; but taking it to be so, the defendant has his remedy for the breach of it. If either of the parties break his part of what he has engaged to do, he will be answerable to the other. In this way perfect justice will be done to both ; but not so if the delivery of a complete cargo were made a condition precedent to the payment of any freight : and therefore I do not think that it was the intention of the parties to make it so. The cases, where acts stipulated to be done by one party have been held to be conditions precedent to the claim of the other, have been where it appeared upon the face of the contract to have been the intention of the parties that the one thing should not be done by one party till something else had been done by the other. But no such intention appears here.

Postea to the plaintiff.[1]

FRANKLIN *v.* MILLER.

IN THE KING'S BENCH, JANUARY 26, 1836.

[*Reported in* 4 *Adolphus & Ellis* 599.]

ASSUMPSIT. The first count stated that defendant, being indebted to divers persons, undertook, by a certain agreement, to pay plaintiff the full amount of all accounts paid for defendant by him, with the expenses, and further to pay over to plaintiff £40 per quarter of his (defendant's) salary, until the said debts should be fully settled ; and that, by the said agreement, plaintiff agreed to advance a sovereign per week, and the rent of £5 5*s*., also Mr. Moxey £5 3*s*. 2*d*., and Mr. Morrison £5 per quarter out of the said £40, which would become due respectively on the first days of January, April, July, and October. And that, in consideration of the premises, and of plaintiff's promise to perform the agreement, defendant promised to perform, etc., on his part. And although plaintiff on, etc., and on divers other days, etc., paid for defendant to divers persons, to wit, etc. (naming them), divers accounts, being debts due and owing from defendant to those persons respectively, and amounting in the whole to a large, etc., to wit, £281, the full amount of which accounts defendant was liable to, and ought to have paid to plaintiff according to the agreement, whereof, etc.

[1] The concurring opinions of Le Blanc and Bayley, JJ., have been omitted.—ED.

(notice to defendant), and although since the making of the agreement, and before the commencement of this suit, divers, to wit, five of the sums of £40 in the agreement mentioned, have become due from defendant to plaintiff according to the agreement, to wit, on October 1st, 1833, and the first days of January, April, July, and October, 1834, and although the debts mentioned in the agreement have not been fully settled, and although defendant hath paid a part, to wit, £160 of the amount of the said accounts so paid as aforesaid, and of the said sums of £40 so due as aforesaid, yet, etc., breach, that defendant hath not paid the residue of the full amount of the said accounts, or of the said sums of £40 which became due as aforesaid, though requested, to wit on, etc., so to do; and there is now due to plaintiff, etc. The same count also charged a breach of contract by defendant, in not paying expenses incurred by plaintiff in settling the accounts paid as aforesaid.

Third plea, as to the first three sums of £40 payment.

Fourth plea, as to the non-payment of two sums of £40, alleged in the declaration to have become due July 1st and October 1st, 1834; that long before the same or either of them became due, to wit, May 1st, 1834, and on divers other days and times afterward, and before the said July 1st, 1834, there were persons, to wit, etc. (mentioning three persons different from those named in the declaration), the residue of the said persons, to whom defendant, at the time of the making of the said agreement, was, and then still continued, indebted in divers sums of money, whereof plaintiff then had notice, and plaintiff could and might then have fully paid or otherwise settled their said debts, had he used due and reasonable care and diligence in that behalf; but plaintiff did not nor would fully pay or settle the same, and carelessly and negligently suffered and permitted the same to be and remain unpaid and unsettled. And defendant further said that, although he did afterward, to wit, April 1st, 1834, pay to plaintiff the said sum of £40 to be by defendant paid to plaintiff on that day for the purposes in the said agreement mentioned; yet plaintiff did not, nor would, thereout or otherwise, at any time afterward, although often requested so to do, advance to defendant a sovereign per week, but wholly neglected so to do; and thereupon defendant, within a reasonable time then next following, and before the said last-mentioned sums of £40 became due and payable, to wit, May 20th, 1834, rescinded and put an end to, and abandoned the said agreement, and gave plaintiff notice thereof, and that defendant should not require plaintiff to perform the same in any-

thing further on his part and behalf to be performed and fulfilled. Verification.

Replication to the fourth plea, that, before and at the time when defendant paid plaintiff the sum of £40 in that plea alleged to have been so paid, defendant was indebted to plaintiff in a large sum of money, to wit, £50 and more, for and in respect of the said money paid by plaintiff for defendant as in the said first count is mentioned ; and that the said last-mentioned sum of £40, at the time when the same was paid by defendant to plaintiff, was of less amount than, and was insufficient to satisfy or discharge, the said money in which defendant was indebted to plaintiff as last aforesaid, and for which money the said agreement in the said first count mentioned was then a security to plaintiff. Verification.

Demurrer to the replication, assigning for causes, that, although the defendant hath, in his fourth plea, alleged that he paid plaintiff the £40 for the purposes of the agreement, the plaintiff hath not in his replication shown any excuse for not applying it to those purposes, and hath endeavored to apply it to other purposes and debts which by law he could not do ; that the replication does not specifically show how the £40 was appropriated, nor what was the subject-matter of the debt due from defendant to plaintiff ; that the replication is a departure ; and that, although defendant in his fourth plea hath shown another breach by plaintiff of the said agreement sufficient to enable defendant to rescind the same, plaintiff hath not, by his replication, traversed or denied, or confessed and avoided the said breach, and hath admitted it. Joinder in demurrer.

R. V. Richards in support of the demurrer.

W. Clarkson, *contra*.

Lord Denman, C.J. The defendant, by his plea, says : "True it is, I did not pay the sums claimed, but there were some debts which you might have paid and have not, and you have not paid me the sovereign per week ; therefore I have rescinded the contract." And this is said when the plaintiff is considerably in advance. It is clear that the defendant had no right to treat the contract as rescinded. That is illustrated by the judgment of Patteson, J., in Withers *v.* Reynolds,[1] where it is said, "If the plaintiff had merely failed to pay for any particular load, that of itself might not have been an excuse to the defendant for delivering no more straw." As, therefore, the defendant, here, has not shown a valid excuse by his plea, it is unnecessary to consider whether or not the replication be bad.

Littledale, J. With respect to the plea, the plaintiff may

[1] 2 B. & Ad. 882.

say: "Assuming that there has been a default made as to my part of the contract, it is only a partial breach, and the defendant's argument would go the length of insisting that if I had in any one week omitted to pay the sovereign, he might put an end to the contract, and deprive me of all the money I have paid in advance, for he states that he has rescinded the agreement altogether." It is a clearly recognized principle that, if there is only a partial failure of performance by one party to a contract, for which there may be a compensation in damages, the contract is not put an end to. In Boone *v.* Eyre,[1] which was an action of covenant on a deed whereby the plaintiff conveyed to the defendant the equity of redemption of a plantation with the stock of negroes upon it, in consideration of an annuity, and covenanted that he had good title and was lawfully possessed of the negroes, and the defendant covenanted that, the plaintiff performing everything in the deed contained on his part, he would pay the annuity, and the breach alleged was non-payment, the defendant pleaded that the defendant was not lawfully possessed of the negroes. On demurrer to the plea, Lord Mansfield said: "The distinction is very clear. Where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent. If this plea were to be allowed, any one negro not being the property of the plaintiff would bar the action." So here, it cannot be contended that, if in any one week the sovereign had been unpaid, that default would put an end to a contract made up of several stipulations, some of which have been executed. It is immaterial to consider whether or not the replication be good.

WILLIAMS, J., concurred.

COLERIDGE, J. I think both the replication and the plea bad. The plea is not good, unless one party to a contract like this may treat it as rescinded, if the other fails in the slightest degree to perform his part of it. The rule is that, in rescinding, as in making a contract, both parties must concur. In Withers *v.* Reynolds[2] each load of straw was to be paid for on delivery. When the plaintiff said that he would not pay for the loads on delivery, that was a total failure; and the plaintiff was no longer bound to deliver. In such a case it may be taken that the party refusing has abandoned the contract. The present case is different, and the plaintiff is entitled to judgment.

Judgment for the plaintiff.

[1] 1 H. Bl. 273, note *a*.

[2] 2 B. & Ad. 882.

BRADFORD AND ANOTHER *v.* WILLIAMS.

IN THE EXCHEQUER, MAY 4, 1872.

[*Reported in Law Reports*, 7 *Exchequer*, 259.]

DECLARATION that the plaintiffs and the defendant entered into a charter-party dated May 26th, 1871, in the terms following: "Bridgwater. It is this day mutually agreed between Captain Gower, of the ship Ark, now at Highbridge, and Messrs. Bradford & Sons (the plaintiffs), that the said ship being tight, etc., shall, with all convenient speed, sail and proceed to a loading berth at Bullo, and there load from the factors of the affreighters a full and complete cargo of coals, . . . and being so loaded, shall therewith proceed to Highbridge or Dunball, and deliver the same on being paid freight at the rate of 2*s*. 9*d*. per ton. . . . The freight to be paid, on unloading and right delivery of the cargo, in cash; to be loaded and discharged with all possible despatch; working days to be allowed the said merchants (if the ship is not sooner despatched) for loading the ship as above, and days on demurrage, at pounds per day. Vessel to load with Gollop & Co., or Gould & Co., till end of September, with captain's option; after September, at Gould & Co. . . . It is understood the vessel shall continue at this rate and term until end of March, 1872, and to discharge equally at Dunball and Highbridge;" that the defendant was then the owner of the Ark, and that subsequently she proceeded to Bullo and there loaded a cargo, and therewith proceeded to Highbridge and there delivered the same, and after the making of the charter-party, and until September, 1871, made divers successive voyages under it; that all conditions, etc., were fulfilled, yet the ship did not, during the period of time commencing with September, 1871, or at any time afterward, continue to perform the things agreed upon, and the defendant, although requested so to do, would not cause or permit the ship, after the commencement of September, or at any time other than the time between the date of the agreement and September, to proceed to the loading berth at Bullo and there load from the factors of the affreighters a full and complete cargo, whereby, etc.

Fourth plea, that after the commencement, and long before the end of September, and before breach, the vessel was at Bullo ready to load, according to the terms of the charter-party, and the captain exercised his option by electing to load from

Gollop & Co., of all which premises the plaintiffs had notice, and although all things happened, etc., necessary to entitle the defendant to have the vessel loaded in the month of September by the plaintiffs from Gollop & Co., yet the plaintiffs were not ready and willing to cause the said vessel to be loaded in the said month or at any subsequent time from or with Gollop & Co., according to the terms of the agreement, but, on the contrary, absolutely refused so to do in violation of the terms of the charter-party, and gave notice to the defendant thereof, wherefore the defendant, as he lawfully might, refused further to perform the said charter-party, which are the alleged breaches.

Demurrer and joinder.

Lopes, Q.C. (*Poole* with him), in support of the demurrer.

Cole, Q.C. (*A. Charles* with him), *contra*.

MARTIN, B. I think the plea is good. The rule with regard to what are or are not conditions precedent is well stated in the notes to Pordage *v.* Cole,[1] and also in Abbott on Shipping, 11th ed., p. 221, and in Chief Baron Pollock's judgment in Hoare *v.* Rennie.[2] Contracts are so various in their terms that it is really impossible to argue from the letter of one to the letter of another. All we can do is to apply the spirit of the law to the facts of each particular case. Now I think the words "condition precedent" unfortunate. The real question, apart from all technical expressions, is, what in each instance is the substance of the contract? And it seems to me that here, under the circumstances alleged, and having reference to the nature of the charter-party, the defendant was entitled to declare the contract at an end. The contract was for the continuous employment of the ship, and the defendant, owing to the plaintiffs' refusal to perform what was, in my judgment, a material part of the bargain, was unable to go on, as he expected, earning his freight. No cross action for damages would have fully compensated him, and that being so, he was justified in his refusal to work any longer under the charter-party. The cases of Withers *v.* Reynolds[3] and Hoare *v.* Rennie,[4] which have been referred to, both seem to me to support the conclusion I have arrived at.

BRAMWELL, B. I am of the same opinion. The contract was for a continuous employment from May, 1871, to March, 1872. But in September, 1871, the plaintiffs in effect said, "We do not mean to go on loading you, the defendant, for a month;" whereupon the defendant said, "Then I shall not go on under the charter-party at all;" and I think he had a right to say so.

[1] 1 Notes to Wms. Saund. 548.
[2] 5 H. & N. at p. 26.
[3] 2 B. & Ad. 882.
[4] 5 H. & N. at p. 26.

Suppose the plaintiffs had said they would not load till some distant date—December, for example ; but that afterward they would again proceed with loading, what ought the defendant to do in such a case ? He would clearly be bound to find some occupation for his ship ; otherwise when he brought his action for damages the plaintiffs would have good cause to complain. Then is he entitled only to do the best he can with his ship until the time named for loading by the plaintiffs, or is he not entitled to do the best he can once for all ? In other words, is he not entitled to treat the charter-party at an end ? In my opinion he may take the latter course, and thus do what is best for himself, and, at the same time, mitigate as far as possible the damages which the plaintiffs would otherwise be liable to pay for their breach of contract.

Take another illustration. A ship is chartered out and home, say from London to New York, the charterer to load a cargo at both places. Then he declines to load in London ; but still insists that the shipowner is to go to New York for the home cargo. Surely this would not be reasonable. Yet the case seems almost exactly analogous to the present. I think, therefore, the plea is good.

PIGOTT, B. I am of the same opinion. This was no mere partial breach by the plaintiffs, but one which, in my judgment, went to the root of the contract. If we look at the nature of the charter-party it is clear that the defendant expected to earn his freight under it week by week. Short voyages were to be made and paid for in cash. Then, in September, the plaintiffs take a course which certainly causes the defendant to lose his freight under the charter-party for a month, and it is said he should have brought a cross action for damages. That, however, would not have completely compensated him for the loss of the regular and continuous employment he had contracted for under the charter-party. I think, therefore, he was justified in his refusal to work under it any longer.

Judgment for the defendant.

BETTINI *v.* GYE.

IN THE QUEEN'S BENCH, JANUARY 25, 1876.

[*Reported in Law Reports*, 1 *Queen's Bench Division*, 183.]

THIRD count, that the defendant was and is the director of the Royal Italian Opera in London, and the plaintiff was and is a dramatic artist and professional singer, and thereupon it was agreed by and between the plaintiff and the defendant in parts beyond the seas, to wit, at Milan, in Italy, by an agreement in writing in the French language, of which the translation is as follows :

"ROYAL ITALIAN OPERA,
"COVENT GARDEN, LONDON.
"Year 1875.

"The undersigned, Mr. Frederick Gye, gentleman, and director of the Royal Italian Opera in London, of the one part, and Mr. Bettini, dramatic artist, on the other part, have agreed as follows :

"1. Mr. Bettini undertakes to fill the part of primo tenor assoluto in the theatres, halls, and drawing-rooms, both public and private, in Great Britain and in Ireland during the period of his engagement with Mr. Gye.

"2. This engagement shall begin on the 30th of March, 1875, and shall terminate on the 13th of July, 1875.

"3. The salary of Mr. Bettini shall be £150 per month, to be paid monthly.

"4. Mr. Bettini shall sing in concerts as well as in operas, but he shall not sing anywhere out of the theatre in the United Kingdom of Great Britain and Ireland from the 1st of January to the 31st of December, 1875, without the written permission of Mr. Gye, except at a distance of more than fifty miles from London, and out of the season of the theatre.

"5. Mr. Gye shall furnish the costumes to Mr. Bettini for his characters according to the ordinary usage of theatres.

"6. Mr. Bettini will conform to the ordinary rules of the theatre in case of sickness, fire, rehearsals, etc.

"7. Mr. Bettini agrees to be in London without fail at least six days before the commencement of his engagement, for the purpose of rehearsals.

"8. In case Mr. Gye shall require the services of Mr. Bettini at a distance of more than ten miles from London, he shall pay his travelling expenses.

"9. Mr. Bettini shall not be obliged to sing more than four times a week in opera. Mr. Bettini, in order to assist the direction of Mr. Gye, will sing, upon the request of Mr. Gye, in the same characters in which he has already sung, and in other characters of equal position. In case of the sickness of other artists, Mr. Bettini agrees to replace them in their characters of first tenor assoluto.

"10. Mr. Gye shall have the right to prolong the period limited above upon the same conditions, provided that the period does not go beyond the end of the month of August.

"F. GYE,

"MILAN, 14 Dec., 1874."

That the plaintiff did not sing anywhere out of the said theatre in the United Kingdom of Great Britain and Ireland, from January 1st, 1875, to the date of the commencement of this action, without the written permission of the defendant, except at a distance of more than fifty miles from London, and out of the season of the said theatre. That the plaintiff was prevented by temporary illness from being in London before March 28th, 1875, but he did arrive in London on that day; and, save as aforesaid, the plaintiff has always performed his said agreement, and was and is ready and willing to perform his part of the said agreement, of all which the defendant had notice, and all things were done and happened, and all conditions were fulfilled and all times elapsed necessary to entitle the plaintiff to a performance by the defendant of the said agreement and to maintain this action. Yet the defendant did not nor would receive the plaintiff into his said service, but wholly refused so to do, and wrongfully exonerated and discharged the plaintiff from his said agreement, and from the performance of the said agreement on the plaintiff's part, and wrongfully put an end to and determined the said agreement, whereby the plaintiff was damnified.

The defendant pleaded, ninthly, to the third count, that the plaintiff was not in London six days before the commencement of the said engagement for the purpose of rehearsals, nor had the defendant notice before the said six days of the plaintiff's inability to be in London, or that he would not be in London six days before the commencement of his said engagement for the purpose of rehearsals, nor was the plaintiff ready and willing to attend such rehearsals, although it was necessary for him to do so, wherefore the defendant did not nor would receive the plaintiff into his service in the capacity and on the terms aforesaid, which is the breach complained of.

Demurrer to the ninth plea, and joinder.

Murphy, Q.C. (*A. L. Smith* with him), for the plaintiff.

Arthur Wilson (*Percy Gye* with him) for the defendant.

The judgment of the Court (Blackburn, Quain, and Archibald, JJ.) was delivered by

Blackburn, J. In this case the parties have entered into an agreement in writing, which is set out on the record.

The Court must ascertain the intention of the parties, as is said by Parke, B., in delivering the judgment of the Court in Graves *v.* Legg,[1] "to be collected from the instrument and the circumstances legally admissible in evidence with reference to which it is to be construed." He adds: "One particular rule well acknowledged is, that where a covenant or agreement goes to part of the consideration on both sides, and may be compensated in damages, it is an independent covenant or contract." There was no averment of any special circumstances existing in this case, with reference to which the agreement was made, but the Court must look at the general nature of such an engagement. By the seventh paragraph of the agreement, "Mr. Bettini agrees to be in London without fail at least six days before the commencement of his engagement for the purpose of rehearsals." The engagement was to begin on March 30th, 1875. It is admitted on the record that the plaintiff did not arrive in London till March 28th, which is less than six days before the 30th, and therefore it is clear that he has not fulfilled this part of the contract.

The question raised by the demurrer is, not whether the plaintiff has any excuse for failing to fulfil this part of his contract, which may prevent his being liable in damages for not doing so, but whether his failure to do so justified the defendant in refusing to proceed with the engagement, and fulfil his, the defendant's, part. And the answer to that question depends on whether this part of the contract is a condition precedent to the defendant's liability, or only an independent agreement, a breach of which will not justify a repudiation of the contract, but will only be a cause of action for a compensation in damages.

This is a question which has very often been raised, and the numerous cases on the subject are collected in the first volume of Sir E. V. Williams's Notes to Saunders, p. 554, in the notes to Pordage *v.* Cole, and in the second volume, p. 742, notes to Peeters *v.* Opie.

We think the answer to this question depends on the true construction of the contract taken as a whole.

[1] 9 Ex. at p. 716; 23 L. J. (Ex.) 228.

Parties may think some matter, apparently of very little importance, essential ; and if they sufficiently express an intention to make the literal fulfilment of such a thing a condition precedent, it will be one ; or they may think that the performance of some matter, apparently of essential importance and *prima facie* a condition precedent, is not really vital, and may be compensated for in damages, and if they sufficiently expressed such an intention, it will not be a condition precedent.

In this case, if to the seventh paragraph of the agreement there had been added words to this effect, "And if Mr. Bettini is not there at the stipulated time Mr. Gye may refuse to proceed further with the agreement ;" or if, on the other hand, it had been said, "And if not there, Mr. Gye may postpone the commencement of Mr. Bettini's engagement for as many days as Mr. Bettini makes default, and he shall forfeit twice his salary for that time," there could have been no question raised in the case. But there is no such declaration of the intention of the parties either way. And in the absence of such an express declaration, we think that we are to look to the whole contract, and applying the rule stated by Parke, B., to be acknowledged,[1] see whether the particular stipulation goes to the root of the matter, so that a failure to perform it would render the performance of the rest of the contract by the plaintiff a thing different in substance from what the defendant has stipulated for ; or whether it merely partially affects it and may be compensated for in damages. Accordingly, as it is one or the other, we think it must be taken to be or not to be intended to be a condition precedent.

If the plaintiff's engagement had been only to sing in operas at the theatre, it might very well be that previous attendance at rehearsals with the actors in company with whom he was to perform was essential. And if the engagement had been only for a few performances, or for a short time, it would afford a strong argument that attendance for the purpose of rehearsals during the six days immediately before the commencement of the engagement was a vital part of the agreement. But we find, on looking to the agreement, that the plaintiff was to sing in theatres, halls, and drawing-rooms, both public and private, from March 30th to July 13th, 1875, and that he was to sing in concerts as well as in operas, and was not to sing anywhere out of the theatre in Great Britain or Ireland from January 1st to December 31st, 1875, without the written permission of the defendant, except at a distance of more than fifty miles from London.

[1] In Graves *v.* Legg, 9 Ex. at p. 716 ; 23 L. J. (Ex.) 228.

The plaintiff, therefore, has, in consequence of this agreement, been deprived of the power of earning anything in London from January 1st to March 30th ; and though the defendant has, perhaps, not received any benefit from this, so as to preclude him from any longer treating as a condition precedent what had originally been one, we think this at least affords a strong argument for saying that subsequent stipulations are not intended to be conditions precedent, unless the nature of the thing strongly shows they must be so.

And as far as we can see, the failure to attend at rehearsals during the six days immediately before March 30th could only affect the theatrical performances and, perhaps, the singing in duets or concerted pieces during the first week or fortnight of this engagement, which is to sing in theatres, halls, and drawing-rooms, and concerts for fifteen weeks.

We think, therefore, that it does not go to the root of the matter so as to require us to consider it a condition precedent.

The defendant must, therefore, we think, seek redress by a cross-claim for damages.

Judgment must be given for the plaintiff.

Judgment for the plaintiff.

POUSSARD *v.* SPIERS & POND.

IN THE QUEEN'S BENCH, APRIL 25, 1876.

[*Reported in Law Reports*, 1 *Queen's Bench Division*, 410.]

DECLARATION on an agreement by the defendants to employ the plaintiff's wife to sing and play in an opera at the defendants' theatre. Breach, that the defendants refused to allow the plaintiff's wife to perform according to the agreement.

Pleas : 1. That defendants did not agree as alleged. 2. That plaintiff's wife was not ready and willing to perform. 3. That plaintiff rescinded the contract before breach. Issue joined.

At the trial before Field, J., at the Middlesex Michaelmas sittings, 1875, judgment was entered for the defendants, with leave to move to enter judgment for the plaintiff for £83.

A notice of motion was given accordingly, and a cross order was obtained by the defendants for a new trial, on the ground that the verdict was against the weight of evidence, and that the damages were excessive.

The facts proved and the course of the trial are fully given in the judgment of the Court.

Percy Gye for the plaintiff.

Parry (*F. H. Lewis* with him) for the defendants.

The judgment of the Court (Blackburn, Quain, and Field, JJ.) was delivered by

BLACKBURN, J. This was an action for the dismissal of the plaintiff's wife from a theatrical engagement. On the trial before my Brother Field it appeared that the defendants, Messrs. Spiers & Pond, had taken the Criterion Theatre, and were about to bring out a French opera, which was to be produced simultaneously in London and Paris. Their manager, Mr. Hingston, by their authority, made a contract with the plaintiff's wife, which was reduced to writing in the following letter :

"CRITERION THEATRE, October 16, 1874.

"*To Madame Poussard :*

"On behalf of Messrs. Spiers & Pond I engage you to sing and play at the Criterion Theatre on the following terms :

"You to play the part of *Friquette* in Lecocq's opera of 'Les Pres Saint Gervais,' commencing on or about the fourteenth of November next, at a weekly salary of eleven pounds (£11), and to continue on at that sum for a period of three months, providing the opera shall run for that period. Then, at the expiration of the said three months, I shall be at liberty to re-engage you at my option, on terms then to be arranged, and not to exceed fourteen pounds per week for another period of three months. Dresses and tights requisite for the part to be provided by the management, and the engagement to be subject to the ordinary rules and regulations of the theatre

"Ratified : E. P. HINGSTON, *Manager*.

"Spiers & Pond.

"Madame Poussard, 46 Gunter Grove, Chelsea."

The first performance of the piece was announced for Saturday, November 28th. No objection was raised on either side as to this delay, and Madame Poussard attended rehearsals, and such attendance, though not expressed in the written engagement, was an implied part of it. Owing to delays on the part of the composer, the music of the latter part of the piece was not in the hands of the defendants till a few days before that announced for the production of the piece, and the latter and final rehearsals did not take place till the week on the Saturday of which the performance was announced. Madame Poussard was unfortunately taken ill, and though she struggled to attend the rehearsals, she was obliged on Monday, November 23d, to leave the rehearsal, go home and go to bed, and call

in medical attendance. In the course of the next day or two an interview took place between the plaintiff and Mr. Leonard (Madame Poussard's medical attendant) and Mrs. Liston, who was the defendants' stage manager, in reference to Madame Poussard's ability to attend and undertake her part, and there was a conflict of testimony as to what took place. According to the defendants' version, Mrs. Liston requested to know as soon as possible what was the prospect of Madame's Poussard's recovery, as it would be very difficult on such short notice to obtain a substitute ; and that in the result the plaintiff wrote stating that his wife's health was such that she could not play on the Saturday night, and that Mrs. Liston had better, therefore, engage a young lady to play the part ; and this, if believed to be accurate, amounted to a rescission of the contract. According to the evidence of the plaintiff and the doctor, Mrs. Liston told them that Madame Poussard was to take care of herself and not come out till quite well, as she, Mrs. Liston, had procured, or would procure, a temporary substitute ; and Madame Poussard could resume her place as soon as she was well. This, it was contended by the plaintiff, amounted to a waiver by the defendants of a breach of the condition precedent if there was one.

The jury found that the plaintiff did not rescind the contract, and that Mrs. Liston, if she did waive the condition precedent (as to which they were not agreed), had no authority from the defendants so to do.

These findings, if they stand, dispose of those two questions. There was no substantial conflict as to what was in fact done by Mrs. Liston. Upon learning, on the Wednesday (November 25th), the possibility that Madame Poussard might be prevented by illness from fulfilling her engagement, she sent to a theatrical agent to inquire what artistes of position were disengaged, and learning that Miss Lewis had no engagement till December 25th, she made a provisional arrangement with her, by which Miss Lewis undertook to study the part and be ready on Saturday to take the part, in case Madame Poussard was not then recovered so far as to be ready to perform. If it should turn out that this labor was thrown away, Miss Lewis was to have a *douceur* for her trouble. If Miss Lewis was called on to perform, she was to be engaged at £15 a week up to December 25th, if the piece ran so long. Madame Poussard continued in bed and ill, and unable to attend either the subsequent rehearsals or the first night of the performance on the Saturday, and Miss Lewis's engagement became absolute, and she performed the part on Saturday, Monday, Tuesday, Wednes-

day, and up to the close of her engagement, December 25th. The piece proved a success, and in fact ran for more than three months.

On Thursday, December 4th, Madame Poussard, having recovered, offered to take her place, but was refused, and for this refusal the action was brought.

On January 2d Madame Poussard left England.

My Brother Field, at the trial, expressed his opinion that the failure of Madame Poussard to be ready to perform, under the circumstances, went so much to the root of the consideration as to discharge the defendants, and that he should therefore enter judgment for the defendants; but he asked the jury five questions.

The first three related to the supposed rescission and waiver. The other questions were in writing and were: 4. Whether the non-attendance on the night of the opening was of such material consequence to the defendants as to entitle them to rescind the contract? To which the jury said, "No." And 5, was it of such consequence as to render it reasonable for the defendants to employ another artiste, and whether the engagement of Miss Lewis, as made, was reasonable; to which the jury said, "Yes." Lastly, he left the question of damages, which the jury assessed at £83.

On these answers he reserved leave to the plaintiff to move to enter judgment for £83.

A cross rule was obtained on the ground that the verdict was against evidence and that the damages were excessive.

We think that, from the nature of the engagement to take a leading, and, indeed, the principal female part (for the prima donna sang her part in male costume as the Prince de Conti) in a new opera which (as appears from the terms of the engagement) it was known might run for a longer or shorter time, and so be a profitable or losing concern to the defendants, we can, without the aid of the jury, see that it must have been of great importance to the defendants that the piece should start well, and consequently that the failure of the plaintiff's wife to be able to perform on the opening and early performances was a very serious detriment to them.

This inability having been occasioned by sickness was not any breach of contract by the plaintiff, and no action can lie against him for the failure thus occasioned. But the damage to the defendants and the consequent failure of consideration is just as great as if it had been occasioned by the plaintiff's fault, instead of by his wife's misfortune. The analogy is complete between this case and that of a charter-party in the ordinary

terms, where the ship is to proceed in ballast (the act of God, etc., excepted) to a port and there load a cargo. If the delay is occasioned by excepted perils, the shipowner is excused. But if it is so great as to go to the root of the matter, it frees the charterer from his obligation to furnish a cargo. See per Bramwell, B., delivering the judgment of the majority of the Court of Exchequer Chamber in Jackson *v.* Union Marine Insurance Co.[1]

And we think that the question, whether the failure of a skilled and capable artiste to perform in a new piece through serious illness is so important as to go to the root of the consideration, must to some extent depend on the evidence ; and is a mixed question of law and fact. Theoretically, the facts should be left to and found separately by the jury, it being for the judge or the Court to say whether they, being so found, show a breach of a condition precedent or not. But this course is often (if not generally) impracticable ; and if we can see that the proper facts have been found, we should act on these without regard to the form of the questions.

Now, in the present case, we must consider what were the courses open to the defendants under the circumstances. They might, it was said on the argument before us (though not on the trial), have postponed the bringing out of the piece till the recovery of Madame Poussard, and if her illness had been a temporary hoarseness incapacitating her from singing on the Saturday, but sure to be removed by the Monday, that might have been a proper course to pursue. But the illness here was a serious one, of uncertain duration, and if the plaintiff had at the trial suggested that this was the proper course, it would, no doubt, have been shown that it would have been a ruinous course ; and that it would have been much better to have abandoned the piece altogether than to have postponed it from day to day for an uncertain time, during which the theatre would have been a heavy loss.

The remaining alternatives were to employ a temporary substitute until such time as the plaintiff's wife should recover ; and if a temporary substitute capable of performing the part adequately could have been obtained upon such a precarious engagement on any reasonable terms, that would have been a right course to pursue ; but if no substitute capable of performing the part adequately could be obtained, except on the terms that she should be permanently engaged at higher pay than the plaintiff's wife, in our opinion it follows, as a matter of law,

[1] Law Rep. 10 C. P. at p. 141.

that the failure on the plaintiff's part went to the root of the matter and discharged the defendants.

We think, therefore, that the fifth question put to the jury, and answered by them in favor of the defendants, does find all the facts necessary to enable us to decide as a matter of law that the defendants are discharged.

The fourth question is, no doubt, found by the jury for the plaintiff; but we think in finding it they must have made a mistake in law as to what was a sufficient failure of consideration to set the defendants at liberty, which was not a question for them.

This view taken by us renders it unnecessary to decide anything on the cross rule for a new trial.

The motion must be refused with costs.

Motion refused with costs.

EDWARD D. JAMES ET AL., APPELLANTS, v. JOHN J. BURCHELL, RESPONDENT.

IN THE COURT OF APPEALS OF NEW YORK, SEPTEMBER 21, 1880.

[*Reported in* 82 *New York Reports* 108.]

APPEAL from judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, affirming a judgment in favor of defendant, entered upon a decision of the Court on trial without a jury. Reported below, 7 Daly, 531.

This action was brought to recover damages for the alleged failure of defendant to perform a contract.

On January 11th, 1871, the parties entered into a contract by which the plaintiff, Sarah James, in consideration of $1, agreed "to sell and convey, or cause to be conveyed," as thereinafter stated, to the defendant, four lots of land in the city of New York, for the sum of $11,000 for each lot. It was further covenanted that the defendant should commence the erection of four houses upon the lots on or before February 10th, 1871, and complete the same within seven months from that date; the plaintiffs to advance $4000 on each house to aid in its erection, and upon being paid and reimbursed the price of said lots and advances thereon, either in cash or the bonds of the defendant, secured by mortgages on the premises, then the plaintiffs agreed "to convey or cause to be conveyed" the same to the defend-

ant, in fee by a full covenant warranty deed free from all reasonable objections and from all incumbrances, except such incumbrances as should be made, or caused or suffered to be made by the defendant ; the latter agreed to complete the contract and to take title within eight months. The plaintiffs also covenanted that Sarah James was seized in her own right of a good title to said premises in fee simple. It was also agreed that the plaintiffs at their election might mortgage each of said lots to the amount of $15,000, and convey the same subject to said mortgages in lieu of purchase-money for the same amount.

The Court found that on the same day the contract was made plaintiffs conveyed the premises by warranty deed to Isaac B. Findull, subject to no incumbrances whatever. Defendant never entered into possession of the premises, but refused to erect the buildings because the plaintiffs could give no valid title to the property.

It appeared that some months after, but before the expiration of the eight months, Findull reconveyed to Mrs. James. Findull was a former clerk of James, and the conveyance to him was without consideration. He knew at the time he received the deed of the contract between the parties.

E. H. Benn for appellants.

Osborn E. Bright for respondent.

MILLER, J. The plaintiffs, in their contract with the defendant, covenanted that Sarah James, one of them, was seized in her own right of a good title to the premises in fee simple which were to be conveyed to the defendant ; and it was further provided, that the plaintiffs, if they so desire, could mortgage each of the lots to the amount of $15,000. On the same day after the contract bears date, and when the parties acknowledged its execution, the plaintiffs conveyed the premises by warranty deed to one Findull, subject to no incumbrances whatever. The question presented is, whether the plaintiffs had a right thus to impair the title, or in any other manner than by the mortgages provided for ; and, as this conveyance was made to Findull, whether the plaintiffs had not violated the covenant, and the defendant was thereby released from any liability under the contract ? The plaintiffs' counsel insists that the fact that another person held the legal title for a portion of the intervening time, or that the defendant, prior to the time fixed for taking title, was required by independent covenants to do certain acts and things toward the performance of the contract on his part, is immaterial. We think he is in error in this respect, and, under the provisions of the contract, the transfer of the title to Findull by the plaintiffs was important and material.

By the contract, as will be seen by reference to the same, the defendant agreed to erect buildings upon the lots, of a certain style and quality, and of considerable value, within seven months from the date, the plaintiffs to advance money from time to time on each of such buildings. The lots were to be conveyed by the plaintiffs by warranty deed, free from incumbrances, except such as should be caused or suffered by the defendant, who was to take title and pay for the same within eight months from date. It is apparent from the terms of the contract that the defendant must have relied to a considerable extent upon the personal responsibility of the plaintiffs. Upon the faith of an existing and perfect title in Mrs. James, he was to take possession, erect valuable buildings, and expend large amounts of money. The covenant that Mrs. James was seized and the permission given to mortgage the premises was not only an inducement for the expenditure of $60,000, to be made by the defendant, as the contract provided, but a guaranty that no other incumbrances should be placed upon the property. The covenant of seizin would be of no benefit if the plaintiffs could convey to a stranger without its violation, and compel the defendant to erect the buildings upon lands to which he might never acquire any title, and, in that event, to trust entirely to an action at law against the plaintiffs for reimbursement or indemnity. From the contract, it is evident that the intention of the parties was that the defendant should be protected in taking possession of the premises, and in the erection of buildings thereon, and, under the circumstances of the case, that the title should remain unimpaired in Mrs. James until the conveyance was delivered. Instead of this, on the very day the contract was acknowledged the plaintiffs conveyed the premises to Findull, who had been a clerk of Mr. James, and who took it in trust for Mrs. James and paid no consideration for the conveyance. They thus parted with all their right and title to the lot, and subjected the defendant to the hazard of losing what might be expended upon the same. As the testimony stood, we think the defendant was not bound to proceed and complete the contract after the plaintiffs had parted with their title by a conveyance to a stranger.

The conveyance by the plaintiffs and the execution of the mortgages by the defendant, according to the contract for the price of the lots and advances, were to be simultaneous acts. In such a case the covenants are dependent, and there must be an existing capacity in the one who is to convey, to give a good title. This distinction is stated fully by Spencer, J., in Robb *v.* Montgomery, 20 Johns. 15. The expenditure to be made, which

was very large, should not, in view of the peculiar provisions of the contract, be regarded as an ordinary payment on account of the purchase-money, as the covenants were manifestly intended and must be considered as mutual and dependent. Judson *v.* Wass, 11 Johns. 525; Tucker *v.* Woods, 12 Johns. 190. We have carefully examined all the cases cited to sustain the proposition contended for by the plaintiffs' counsel, and we think that none of them uphold the doctrine that in a case presenting the characteristic features of the one at bar, a conveyance to a third party is not material.

Some stress is laid by the appellants' counsel upon the provision in the contract that the plaintiffs agreed "to sell and convey, or cause to be conveyed." This is not controlling; and taking the whole contract together, we think that the testimony shows that the defendant did not intend to accept any other warranty than that of the plaintiffs. That Findull knew of the contract with the defendant at the time he took the deed, and therefore he took it subject to the rights of the defendant and could have been compelled to convey, is not important, for, as we have seen, the defendant lost the benefit of the plaintiffs' responsibility by the transfer of the title without any consideration whatever to a person of at least doubtful responsibility, and thus was not sufficiently protected in making the large expenditure required for the building of the houses. The defendant had a right to rely upon the responsibility of the plaintiffs under the contract, and the want of it may well have prevented the defendant from taking possession and from erecting the buildings as was intended. The subsequent reconveyance by Findull to Sarah James could have no effect in restoring the defendant's rights which were affected by the conveyance to Findull. The conveyance from Findull to the plaintiffs was not made until some months after the conveyance by the plaintiffs to him, and was recorded even long after that, and it is not proved to have been brought to the knowledge of the defendant. The defendant, with knowledge of the want of title in the plaintiffs, was not, under the covenants in the contract, bound to take possession and proceed with the erection of the buildings.

The question whether the deed to Findull was made and delivered before or after the making and delivery of the contract is not vital, as in either contingency the plaintiffs had broken the covenant of seizin, and as the covenants were dependent and mutual, the defendant was under no obligation to proceed and erect the buildings and fulfil the terms of the contract. In view of the covenants which have been considered, the contract was at an end when the conveyance was made to Findull. The

finding of the judge, that the contract was executed and delivered upon January 11th, 1871, being the time of its acknowledgment instead of the day of its date, is therefore not material, and even if erroneous, cannot affect the result. For the same reason, the refusal to find that the deed was delivered after the date of the contract, was not erroneous. There was no error in refusing to send the case back for further findings, or in any of the refusals to find, or in any other respect.

The judgment should be affirmed.

All concur except FOLGER, C.J., and RAPALLO, J., not voting, and FINCH, J., absent at argument.

Judgment affirmed.

SECTION II.—CONDITIONS SUBSEQUENT.

ELLIOTT *v.* BLAKE.

IN THE KING'S BENCH, MICHAELMAS TERM, 1662.

[*Reported in* 1 *Levinz* 88.]

COVENANT and declares, That the defendant covenanted to deliver to him 1500 measures of saltpetre before such a day, and that he had not done it; the defendant demands *oyer* of the deed, wherein the covenant was as before said. Provided, That if any mischance happen by fire or water to disable him, that he should be excused; and pleads that he was disabled by accident of fire. Issue thereupon and verdict for the plaintiff. And it was moved in arrest of judgment, that there was a variance between the deed on which he declared and that produced in Court; for the one is absolute and the other conditional. But judgment was given for the plaintiff, for he need not declare on more of the deed than the covenant, and it is on the defendant's part to show the proviso, which goes by way of defeasance of the covenants.

CAGE *v.* ACTON.

IN THE KING'S BENCH, HILARY TERM, 1697.

[*Reported in* 1 *Lord Raymond* 515.]

THE plaintiff brought an action of debt for rent against the defendant as administratrix to her husband, and he declared upon a demise made to the intestate rendering rent, and for rent arrear in the life of the intestate this action was brought, etc. The defendant pleads, that the intestate in his lifetime,

in consideration of a marriage to be solemnized between the said intestate and the defendant, became bound to the defendant in a bond of £2000 *solvendis* to the defendant *cum adinde requisitus esset*, upon condition, that if the defendant should survive the intestate, if then the intestate should leave to the defendant £1000, or if his heirs, executors, or administrators should pay to the defendant £1000 within, etc., after the death of the intestate, that then the bond should be void ; and then the defendant avers, that the marriage afterward took effect ; she avers also the death of the intestate, and that he had not left her £1000, nor had his heirs paid it to her ; and then she shows that she herself took out letters of administration of the goods, etc., of the intestate, and that assets to the value of £250 came to her hands, which she retains in part of satisfaction of the money due by this bond ; and that she hath not assets *ultra*, etc. The plaintiff demurs. This case was argued several times at the bar by Conyers and Levinz for the plaintiff, and by Carthew and Northey for the defendant. And now the judges pronounced their opinions in solemn arguments. And two questions were made in this case. Second, admitting that this retainer is well pleadable in bar in respect of the nature of the debts, yet whether there is here any debt due to the defendant upon this bond, in regard that there was an extinguishment of it upon the intermarriage, or not ?[1] But as to the second point the Court was divided, viz., Turton and Gould, JJ., were of opinion, that this debt was not extinguished by the intermarriage, and therefore that the plea was good, and judgment ought to be for the defendant. But Holt, C.J., held, that this debt was extinguished, and therefore that judgment ought to be given for the plaintiff. And Gould, J., argued for the defendant in this manner following : First, he said, he agreed, that the wife before the marriage might have released this bond by a release of all actions, because she had the right of action in her. Second, that by the intermarriage all contracts for debts due *in præsenti*, or *in futuro*, or upon contingency, which may become due during the coverture, are extinct. First, because the husband and wife make but one person in law. Second, because the action is suspended. 11 Hen. 7, 4*b* ; Co. Li. 164*b* ; 8 Co. 136*a* ; Dier, 140 ; Cro. Car. 373. Third, that if there was an express agreement that they should not be released by the intermarriage, it would be void, because it would be inconsistent with the state of matrimony, the husband and wife being but one person in law, and so there is not debtor and debtee, and therefore the debt is extinct in such case notwith-

[1] Only so much of the case is given as relates to this question.—Ed.

standing such covenant. Fourth, he said that he was at the beginning, when this case was first argued at the bar, of opinion that this bond was extinct by the intermarriage. But now after mature consideration he was of opinion that it might subsist by the rules of law ; for the law does not love that rights should be destroyed, but on the contrary for the supporting of them invents notions and fictions, as abeyance, etc. Litt. § 646 ; Co. Li. 342. Now in this case the express agreement of the parties created a right, and such a right as is not inconsistent with the rules of marriage, since the bond here ought not to have any effect till after the death of the husband ; and therefore the law will not work a release, especially since there are two rules of law, which would be broken by the destruction of this agreement. First, *modus et conventio vincunt legem.* Second, that the law will not work a wrong. But since a suspension of rights in personal duties does not always work an extinguishment, as appears by the cases hereafter put, he was of opinion that this bond was suspended only during the coverture. As 8 Co. 136*a* ; Co. Li. 264*b*, the wife executrix of the debtee takes the debtor in marriage ; the debt is not released, but the right is suspended *pro tempore.* And so here the law preserves it from extinguishment, by interposing, and taking it into its custody, for the making of the agreement of the parties effectual. If the obligee make the obligor executor, because it is his own act, it is a release of the debt ; but otherwise if administration was committed. 8 Co. 136 ; Nedham's case ; Cro. Car. 373 ; Dorchester *v.* Webb. Besides that, 26 Hen. 8, 7*b* proves that the law does not absolutely work an extinguishment ; for it is held there that if there be a divorce, the wife shall have her goods again ; and Fitzherbert and Norwich put the case of a bond by the husband to the wife before the coverture, and said that though it was in suspense during the coverture, yet after the divorce the wife might sue him upon it. So here he agreed that this debt was qualified and remediless during the coverture. And, by him, there is no solid difference between the cases of Clark *v.* Thompson ; Cro. Jac. 571, and Smith *v.* Stafford ; Hob. 216 ; Hutt. 17 ; Noy, 26 ; Hetl. 12, of a promise made by the husband to the wife before the coverture, to leave her £100 at his death, and this case of a bond ; for as Hobart there observes, it is a promise presently though futurely to be performed, and has a present lien. And therefore as the promise was held to be in suspense, so here the debt is suspended during the coverture, for preserving an honest agreement, which otherwise would be destroyed. For the difference taken in Noy, and there said to

be agreed by the Court, viz., that it would be otherwise in case of a bond, no such matter is reported in Hobart or Hutton ; and therefore he could not say how far the said point of the bond was under their consideration. It is said in Hutton that the law will not work a release contrary to the intent of the parties, because the marriage, which is the cause, will not destroy that which itself creates, which is the same in the case of the bond. And in Littlet. Rep. 32, the same with Hetl. 12, the promise is said to be suspended by the marriage, which he said is done here in the case of the bond. And Hobart does not seem to make any difference between a promise and a bond, and he could not believe that there is any ; and therefore he was of opinion that the plea was good, and that judgment ought to be given for the defendant.

TURTON, J., argued much to the same purpose. And he agreed that if this bond had been given for a precedent debt, it had been destroyed by the marriage, which had been a release in law. But a release in law will never destroy the provision that was intended for the wife by the express agreement of the parties. But such releases shall be taken strictly. And Hutt. 17, 18 ; Plowd. 184 ; Hutt. 94 ; Hob. 10 ; Moor, 855, were cited by him to prove it. And he said that this debt, being in contingency during the coverture, could not be released, for the bond and condition make but one deed, and upon *oyer* of the condition it appears that if the wife did not survive the husband, nothing would be due to her ; and therefore being a contingency, and only a bare possibility, could not be released. As 5 Co. 70*b*, Hoe's case. A man cannot release to the bail in the King's Bench before judgment against the principal. And therefore if it could not be released by a release in fact, no more could it be released by a release in law. And a bond cannot be sued until the condition is broken, which in this case could not be during the coverture, and therefore this debt is qualified. Then he cited the aforesaid cases cited by Gould, J., concerning the promises, and also 2 Sid. 58, the roll of which he had seen, and which is entered Mich. 1657 ; Rot. 629, *sup. banc.*; Hoblin *v.* Lupart, where the case was thus : debt was brought upon a bond by Hoblin, a stranger against Lupart, of which the condition was, that Lupart should perform covenants in certain marriage articles, in which Lupart covenanted with his wife before marriage, to leave to her, etc., if she should survive him, and if he should survive her, that he should pay to the executors of his wife £400, Lupart pleaded there, covenants performed ; Hoblin replied, and assigned a breach, that he had not paid the £400, etc., and judgment was entered

for the plaintiff, as appears upon the record. And this case he urged as strong in point, together with the arguments and reasons therein used in 2 Sid. 58. And as to the objection, that this was *debitum in præsenti*, etc. He answered, that that was rather sound than substance. And he cited Litt. Rep. 87, that by a release of all demands a bond with condition to perform covenants shall not be released before the covenants are broken ; and yet it is *debitum in præsenti* as much there as in this case. But a release of the covenants would discharge the bond. Dier, 57. And he cited the words of Henden in Littleton's Reports, that it is not chose in action, but the possibility of a chose in action. And he relied upon the case of Hancock *v.* Field, there cited, as a case in point. (But see Cro. Jac. 170 ; 2 Roll. Abr. 407, that the said case was an action of covenant, and not debt upon a bond with condition to perform covenants, as it is there cited.) And therefore he agreed with Gould, J., that judgment ought to be given for the defendant.

HOLT, C.J., argued *e contra* for the plaintiff, viz., that the bond was extinguished by the intermarriage. And the foundation of his opinion was because it is an immediate debt due from the sealing of the bond. Litt. § 512, and the reason which Coke in his comment upon Littleton, 292*b*, gives, why a release of all actions before the day of payment will discharge it, though no action can be maintained upon it until after the day of payment, is, because it is a chose in action. And then if it is a present debt, the question will be, whether the condition will make any alteration. The nature of the condition therefore ought to be considered ; and the condition here is a subsequent condition, and therefore cannot diminish, alter, or qualify the debt ; but the debt will have the same existence that it had before. And in its nature it cannot be a subsequent condition, unless there be a precedent debt, to which it was annexed. And the difference is put in 5 Co. 70*b*, Hoe's case, as to the matter of the release, between a duty certain with a condition subsequent, and a duty uncertain to be reduced to a certainty upon a condition precedent ; the first is releasable before the day, the second not. And to say here that this is not a present debt, is expressly contrary to the words of the bond, viz., that the obligor binds himself in £200 to be paid when he should be required. The condition goes in defeasance, but does not suspend the debt, for that would make the condition repugnant. And if the breach of the condition were to raise the debt, it ought always to be shown in the declaration, which is against constant experience ; and yet it ought necessarily to have been shown, if it raised the debt, as they always

do in case of a condition precedent. And as to the objection, that the defendant might have *oyer* of the condition, and then it becomes part of the declaration. He answered, that that did not compel the plaintiff to show a breach of the condition, which nevertheless ought to be done, if the breach of the condition was necessary to raise the debt. But the reason why there is *oyer* of the condition is, because it is part of the same deed ; but that does not drive the plaintiff to alter his declaration. If the defendant says nothing, or demurs, the Court must give judgment upon the bond, without having any regard to the condition ; but if it appears upon the whole matter that the condition is not broken, the Court cannot give judgment for the plaintiff. Then since it is an immediate debt by the intermarriage it is discharged. First, because the husband cannot be indebted to his wife, for they are but one person in law. Second, the husband might pay the money due upon the bond without having respect to the condition, and that would discharge the bond. 11 Hen. 4, 43, which since he cannot do to his wife, such payment being impertinent, as if the right hand should pay to the left, for this reason it is released. Third, the intermarriage is an actual payment, because the husband is entitled to receive the money. And when the person who ought to pay the money is the same with the person who ought to receive it, it is in law a payment. Suppose a stranger, who was bound to the wife *dum sola*, would pay the money, he ought to pay it to the husband ; then if the husband be debtor to the wife *dum sola*, and would pay, etc., after marriage he must pay himself. If a stranger had been bound to the wife in a bond with the same condition as here, a release by the husband would have discharged the bond. Co. Li. 264*b* ; Plowd. 184 ; Woodward *v.* Darcy. The law books do not make any distinction between bonds, in which there is a precedent duty, and others, *et ubi lex non distinguit, nec judices distinguere debent.* And therefore he held that the bond was discharged. If this had been a single bill, statute, or recognizance, with a defeasance of the same purport as the condition of this bond, he said, that without doubt the intermarriage would have released them, yet the statute, etc., would have been as much qualified by the defeasance as the bond here by the condition ; and the agreement of the parties had been the same in both. The only difference is, that in the case of the bond the defeasance is contained in the same deed, and therefore the deed being in Court one may have *oyer* of the condition ; in the other case the defeasance is in the hands of the defendant, being in another deed, and therefore there cannot

be *oyer* of it, but yet in both cases the defendant ought to plead the condition or defeasance, and therefore in both cases the law is the same.

Objection. If the executor of the obligee marries the obligor, the debt is not extinguished.

Answer. That depends upon different reasons. For, first, the difference of the rights there preserves the debt from extinguishment. As where a man has a term as executor, and purchases the inheritance, the term is not extinguished. Co. Li. 264*b*, 338*b*. Second, if that should be an extinguishment, it would be a wrong to creditors, and amount to a *devastavit*, which an act in law will not do. 8 Co. 136*a*. And things shall be extinguished between the parties, which yet shall remain, and have existence, as to strangers. As if a tenant for life grants a rent charge, and then surrenders to the reversioner; or if a man, who has a rent in fee, acknowledges a statute, and then releases to the terretenant, the estate for life in the one case will continue as to the grantee of the rent, and the rent in the other case as to the conusee. But if the husband pays debts of the testator with his own money, amounting to the sum in which he was bound to the testator, that will amount to a release of the debt, because it is an honest payment, and prevention of a wrong.

Objection. The intermarriage will not destroy that which itself supports.

Answer. That the bond is not supported by the marriage, but by its own efficacy. The bond was made in consideration of an intended marriage, but it had its full force and effect instantly upon the sealing and delivery.

Objection. That the law will not do wrong.

Answer. That this was the act of the wife herself, and therefore she is not injured. And this is no more than that she did not well understand what she was going to do, and there is no third person in the case.

Objection. 26 Hen. 8, 7*b*. That a wife after a divorce shall have her goods again, and the bond would revive.

Answer. He agreed the said case, because the divorce being *a vinculo matrimonii* by reason of some prior impediment, as precontract, etc., makes them never husband and wife *ab initio*. But if the husband had made a feoffment in fee of the lands of his wife, and then the divorce had been, that would have been a discontinuance as well as if the husband had died, because there the interest of a third person would have been concerned; but between the parties themselves it will have relation to destroy the husband's title to the goods. And it

proves no more than the common rule, viz., that relation will make a nullity between the parties themselves, but not among strangers.

And as to the objection made by Turton, J., that there is nothing here to be released, because it is but a contingency, and a bare possibility. He answered, that that avails nothing, because a release of the condition will not release the bond, but they must release the bond itself.

He agreed also the cases of Smith *v.* Stafford and Clark *v.* Thompson, that the intermarriage would not extinguish such a promise, though Hobart is of a contrary opinion. But there is a difference between the said cases and this present case, because the promise must raise a future duty upon a contingency, so that there is nothing due there, nor ever was, and it is a question whether there ever will be. In an action upon the promise all the special matter must be shown in the declaration, but otherwise in the case of a bond. Pleading, though it does not make the law, yet is good evidence of the law, because it is made conformable to it. If, therefore, in the one case there is no need to show a breach, and in the other one must show it, that proves that in the case of the bond the duty arises immediately, and is defeasanced by the condition ; but in the other case it arises upon the performance of the condition, which ought to precede it ; and consequently the cases are as different as a condition precedent and subsequent.

He said, also, that there is no difference between the case of Lupart *v.* Hoblyn, which is covenant, 2 Sid. 58, and the case of a promise. For in covenant one must show the special matter, and assign a breach, as one ought in that of a promise. And a release of all demands will not discharge the covenant before it be broken, as it will not discharge the promise before the time of performance, but it will discharge a bond before the condition broken. But the lien of the bond, if it was upon condition precedent, would be of the same nature. If a stranger promised to a woman, that in consideration that she would marry such a man, he would pay her so much if she survive her husband, the husband could not have released this promise, because nothing could become due during the coverture ; but when the wife has a duty, which may become due during the coverture, the husband may discharge that, according to Lampet's case. 10 Co. 46.

The reason given in 2 Cro. 571, Clark *v.* Thompson, why the marriage of the promisor with the promisee is no discharge of the promise, viz., because the husband could not release it, ought to be understood of a promise made by a stranger ; and

those words ought to be added, as appears by the reason of it ; but in case of such a bond the husband might release it. In Yelv. 156, Belcher *v.* Hudson, it is insinuated, as if the husband might have released such a promise made by a third person ; but the book there is nonsense, and in the same case, Cro. Ja. 222, the only question is there, whether it be released by a release of all demands, and no consideration had of the case upon the point of the marriage.

Noy, in his report of the case of Smith *v.* Stafford, reports that it was said by Warburton, that it would be otherwise in the case of a bond, and that the whole Court agreed it ; and nevertheless they resolved otherwise in the case of a promise ; which proves that it must necessarily be that they grounded themselves upon the difference between a bond and a promise, or otherwise their resolution will be contradictory. And one must consider the whole case, and not disallow the distinction, and agree the resolution ; for that would be to agree the conclusion, and deny the premises.

Objection. The intent and agreement of the parties.

Answer. That the intent of the parties cannot alter the rules of the law, and make an immediate present lien, not to have any efficacy.

Besides that, he said in such a case as here the Chancery will not give relief, as appears in Chanc. Cas. 21, Lady Darcy *v.* Chute. Much less ought the King's Bench upon equitable considerations to give judgment against the rules of law. And therefore for these reasons he was of opinion, that judgment ought to be given for the plaintiff. But judgment was given for the defendant by the other two judges. Afterward error was brought upon this judgment.

HESKETH *v.* GRAY.

In the King's Bench, Hilary Term, 1755.

[*Reported in Sayer* 185.]

An action of debt being brought upon a bond in the penalty of £5000, and *oyer* being prayed of the bond, it appeared from a recital therein, that Robert Hesketh, the plaintiff, had presented John Gray, the defendant, to the vicarage of Steyning in the county of Sussex ; and that it was agreed betwixt them, that the said John should, within three months after the expiration of six years, to commence from the day of the date of the

bond, at the request of the said Robert, his heirs, executors, administrators, or assigns, resign and deliver up the said vicarage into the hands of the proper ordinary, so that it may become vacant, and the said Robert, his heirs, executors, administrators, or assigns, may present anew. It likewise appeared that the condition of the bond was, that if the said John shall, within three months after the expiration of six years, to commence from the day of the date of the bond, at the request of the said Robert, his heirs, executors, administrators, or assigns, resign and deliver up the said vicarage into the hands of the proper ordinary, whereby it may become vacant, and the said Robert, his heirs, executors, administrators, or assigns, may present anew, then the obligation to be void.

The defendant pleaded : that he did, within three months after the expiration of the six years mentioned in the condition of the bond, at the request of the said Robert, offer to resign and deliver up into the hands of Matthias, Lord Bishop of Chichester, who was the proper ordinary, the said vicarage, for the said ordinary to accept the same, whereby the said vicarage might become vacant, and the said Robert might present anew ; and that the said ordinary did then refuse, and from thenceforth hitherto hath refused to accept such resignation.

Upon a demurrer to this plea, it was holden to be bad, because it is not therein averred that the bishop accepted the resignation.

Ryder, C.J. The defendant, by undertaking to resign, so that the vicarage may become vacant, and the plaintiff may present anew, has undertaken for the bishop's acceptance of a resignation ; which, according to what is laid down in Fane's case, Cro. Ja. 198, is necessary to the completion of a resignation.

Several cases have been cited in which it has been holden, that if a third person, who is a trustee for the obligee, refuse to do an act, for the doing of which the obligor has undertaken, the penalty of the bond is saved. And in order to bring the present case within the reason of those cases, it has been said that the bishop is to be considered as a trustee for the obligee. If the bishop were a trustee for the obligee, it would be in the obligee's power to compel him to accept a resignation, it being always in the power of a *cestui que trust* to compel his trustee to execute the trust. But it is not, in the present case, in the power of the obligee to do this, and consequently the bishop is not to be considered as a trustee for the obligee.

We are of opinion that the bishop is, in the present case, a stranger to the obligee ; and if this be so, it was incumbent upon the obligor to procure his acceptance of a resignation. In 1 Roll. Abr. 452, 5 Rep. 23, and 1 Saund. 216, it is laid down that if the obligor undertake for the act of a third person, who is a stranger to the obligee, it is incumbent upon the obligor to procure the act to be done, unless there were at the time of entering into the bond an impossibility of doing the act, or unless the doing thereof have been since rendered impossible by the act of God, or by the act of law.

SIR RICHARD HOTHAM, KNIGHT, AND ANOTHER *v.* THE EAST INDIA COMPANY.

IN THE KING'S BENCH, FEBRUARY 12, 1787.

[*Reported in* 1 *Term Reports* 638.]

COVENANT on a charter-party of affreightment. The declaration, after stating several parts of the charter-party, by which it appeared that the plaintiffs had let their ship, The Royal Admiral, to the defendants for a voyage to the East Indies and back again, stated the following covenant on which the breach was assigned : "That, notwithstanding the ship was let to freight but for 903 tons, yet the Company should lade on board as many goods as the ship could bring, or was capable of taking in with safety, paying to the said owners freight for the same, according to the tonnage aforesaid." In a former part of the charter-party, stated in the declaration, is the following covenant : "And to the end the tonnage of the said ship, and the freight thereby payable, might be the better ascertained, it was thereby covenanted that no claim should be admitted, or allowance made by the defendants, for short tonnage or deficiency in loading the said ship in or for her homewardbound voyage, unless the same should be certified by the defendant's president, agents, or chiefs and councils, or supercargoes, from whence she should receive her last dispatch, which said certificate the said presidents, agents, or chiefs and councils, or supercargoes respectively, should give to the master for the time being, if reasonably demanded ; and also unless such short tonnage be found and made to appear on her arrival in the river Thames upon a survey to be taken by four shipwrights, or others, to be indifferently named and chosen by the defendants

and the plaintiffs ; but no such survey would be taken or allowance made, in case bulk should be found to have been broken before demand for such short tonnage was made."

The declaration then stated that, although the defendants loaded and put on board the said ship goods, etc., to the amount of 903 tons ; and although the said ship could have brought, and was capable of taking in, with safety, goods, etc., to the amount of 100 tons more than the 903 tons, and more than were loaden and put on board the said ship by the defendants, their factor or assigns, from Bombay to London ; and although the defendants, their factors and assigns, had notice of the premises last aforesaid before the ship sailed and departed from the East Indies on her voyage to England, and were then and there required to load the said ship with the residue of the said goods, etc., so as to complete her loading, and put on board her for the said voyage what she could reasonably and safely have carried ; and although the plaintiffs offered to take in such loading, yet the defendants, their factors and assigns, absolutely refused fully to load the said ship, or to put any more goods, etc., on board her ; and the said ship, by means whereof, was obliged to sail from Bombay to London deficient in her loading to the amount of 100 tons ; neither have the defendants yet paid to the plaintiffs any freight or any sum of money for the said deficiency, but have refused, etc.

The defendants pleaded, first, that the ship was not capable of taking in more than 903 tons, on which issue was taken. And, secondly, that the allowance claimed for short tonnage and deficiency in loading the ship was not certified by the Company's president, agents, etc.

Replication, that the plaintiffs requested the Company's president, agents, etc., to certify the deficiency, and that they wholly refused. Rejoinder, taking issue on that fact.

This cause was tried at the sittings at Guildhall after last term, when the jury found a verdict for the plaintiffs on both the issues.

A motion was made in arrest of judgment this term by law, because the plaintiffs had not averred in their declaration that a certificate of short tonnage was obtained from the defendant's servants before the ship sailed from India ; and because it was not averred that upon her arrival in the river Thames, and before bulk was broken a survey was had, and that such short tonnage was found and made to appear.

Erskine, *Mingay*, *Baldwin*, and *Watson* showed cause.

Bearcroft, *Rous*, and *Daw* in support of the rule.

The Court took time to consider, and now

ASHHURST, J., delivered their opinion (after stating the pleadings).

The objections that have been made are that the certificate previous to the ship's sailing from the East Indies, and the survey after her arrival in the Thames are conditions precedent to the plaintiffs' right to recover for short tonnage ; and being such, and performance not being averred, it is a radical defect in the plaintiff's title, and is not cured by a verdict, but is objectionable in arrest of judgment. And if they were right in their premises—namely, that these are conditions precedent—the conclusions which they draw from it would be right. It becomes necessary then to be considered whether these are conditions precedent or not. Now in order to clear this point, I would first premise, that there are no precise technical words required in a deed to make a stipulation a condition precedent or subsequent ; neither doth it depend on the circumstance whether the clause is placed prior or posterior in the deed, so that it operates as a proviso or covenant. For the same words have been construed to operate as either the one or the other, according to the nature of the transaction. The merits, therefore, of the question must depend on the nature of the contract, and the acts to be performed by the contracting parties, and the subsequent facts disclosed on the record, which have happened in consequence of this contract. It is unnecessary to say whether the clause relative to the certificate be a condition precedent or not ; for granting it to be a condition precedent, yet the plaintiffs having taken all proper steps to obtain the certificate, and it being rendered impossible to be performed by the neglect and default of the Company's agents, which the jury have found to be the case, it is equal to performance. If it were necessary to cite any case for this, which is evident from common sense, it was so held in Roll's Abridgment, 445, and many other books. If so, there was a right of action once fairly vested in the plaintiffs, from the defendants not having fully laden the ship before she left India, which they were by their covenant bound to do. For all that is necessary *prima facie* to found an action of covenant upon is that the covenant should be broken. And this right of action, once vested, was only capable of being divested by a subsequent non-feazance—namely, by not taking the proper steps to procure a survey after the arrival of the ship in the river Thames. This, therefore, being a circumstance, the omission of which was to defeat the plaintiffs' right of action once vested, whether called by the name of a proviso by way of defeazance, or a condition subsequent, it must in its nature be a matter of defence, and ought

to be shown by the defendants ; and as they have not insisted on it, though they have insisted on the want of a certificate, we must, after verdict, take it that the fact did not exist ; and it will follow as a consequence that there is no ground for arresting the judgment, and that the rule must be discharged.

Rule discharged.

WILLIAM GRAY *v.* OLIVER GARDNER AND OTHERS.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, MARCH TERM, 1821.

[*Reported in* 17 *Massachusetts* 188.]

ASSUMPSIT on a written promise to pay the plaintiff $5198.87, with the following condition annexed—viz., "On the condition that if a greater quantity of sperm oil should arrive in whaling vessels at Nantucket and New Bedford, on or between the first day of April and the first day of October of the present year, both inclusive, than arrived at said places, in whaling vessels, on or within the same term of time the last year, then this obligation to be void." Dated April 14th, 1819.

The consideration of the promise was a quantity of oil sold by the plaintiff to the defendants. On the same day another note unconditional had been given by the defendants, for the value of the oil estimated at 60 cents per gallon ; and the note in suit was given to secure the residue of the price estimated at 85 cents, to depend on the contingency mentioned in the said condition.

At the trial before the Chief Justice the case depended upon the question whether a certain vessel, called the Lady Adams, with a cargo of oil, arrived at Nantucket on October 1st, 1819, about which fact the evidence was contradictory. The judge ruled that the burden of proving the arrival within the time was on the defendants, and further that, although the vessel might have, within the time, gotten within the space which might be called Nantucket Roads, yet it was necessary that she should have come to anchor, or have been moored, somewhere within that space before the hour of twelve following the first day of October in order to have arrived within the meaning of the contract.

The opinion of the Chief Justice on both these points was objected to by the defendants, and the questions were saved. If it was wrong on either point, a new trial was to be had, other-

wise judgment was to be rendered on the verdict, which was found for the plaintiff.

Whitman for the defendants.

F. C. Gray for the plaintiff.

PARKER, C.J. The very words of the contract show that there was a promise to pay, which was to be defeated by the happening of an event—viz., the arrival of a certain quantity of oil at the specified places in a given time. It is like a bond with a condition ; if the obligor would avoid the bond, he must show performance of the condition. The defendants in this case promise to pay a certain sum of money on condition that the promise shall be void on the happening of an event. It is plain that the burden of proof is upon them, and if they fail to show that the event has happened, the promise remains good.

The other point is equally clear for the plaintiff. Oil is to arrive at a given place before 12 o'clock at night. A vessel with oil heaves in sight, but she does not come to anchor before the hour is gone. In no sense can the oil be said to have arrived. The vessel is coming until she drops anchor or is moored. She may sink or take fire, and never arrive, however near she may be to her port. It is so in contracts of insurance, and the same reason applies to a case of this sort. Both parties put themselves upon a nice point in this contract ; it was a kind of wager as to the quantity of oil which should arrive at the ports mentioned before a certain period. They must be held strictly to their contract, there being no equity to interfere with the terms of it.

Judgment on the verdict.

SEMMES *v.* HARTFORD INSURANCE COMPANY.

IN THE SUPREME COURT OF THE UNITED STATES, DECEMBER TERM, 1871.

[*Reported in* 13 *Wallace* 158.]

IN error to the Circuit Court for the District of Connecticut.

Semmes sued the City Fire Insurance Company, of Hartford, in the Court below, on October 31st, 1866, upon a policy of insurance, for a loss which occurred on January 5th, 1860. The policy as declared on showed as a condition of the contract, that payment of losses should be made in sixty days after the loss should have been ascertained and proved.

The company pleaded that by the policy itself it was expressly provided that no suit for the recovery of any claim upon the same should be sustainable in any court unless such suit should be commenced within the term of twelve months next after any loss or damage should occur; and that in case any such suit should be commenced after the expiration of twelve months next after such loss or damage should have occurred, the lapse of time should be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced. And that the plaintiff did not commence this action against the defendants within the said period of twelve months next after the loss occurred.

To this plea there were replications setting up, among other things, that the late civil war prevented the bringing of the suit within the twelve months provided in the condition, the plaintiff being a resident and citizen of the State of Mississippi and the defendant of Connecticut during all that time.

The plea was held by the Court below to present a good bar to the action, notwithstanding the effect of the war on the rights of the parties.

That court, in arriving at this conclusion, held, first, that the condition in the contract, limiting the time within which suit could be brought, was, like the Statute of Limitation, susceptible of such enlargement, in point of time, as was necessary to accommodate itself to the precise number of days during which the plaintiff was prevented from bringing suit by the existence of the war. And ascertaining this by a reference to certain public acts of the political departments of the Government, to which it referred, found that there was, between the time at which it fixed the commencement of the war and the date of the plaintiff's loss, a certain number of days, which, added to the time between the close of the war and the commencement of the action, amounted to more than the twelve months allowed by the condition of the contract.

Judgment being given accordingly in favor of the company the plaintiff brought the case here.

The point chiefly discussed here was when the war began and when it ceased; W. Hamersley, for the plaintiff in error, contending that the Court below had not fixed right dates, but had fixed the commencement of the war too late and its close too early, and he himself fixing them in such a manner as that even conceding the principle asserted by the Court to be a true one, and applicable to a contract as well as to a Statute of Limitation, the suit was still brought within the twelve months.

The counsel, however, denied that the principle did apply to

a contract, but contended that the whole condition had been rendered impossible and so abrogated by the war, and that the plaintiff could sue at any time within the general statutory term, as he now confessedly did.

R. D. Hubbard, contra.

MILLER, J., delivered the opinion of the Court.

It is not necessary, in the view which we take of the matter, to inquire whether the Circuit Court was correct in the principle by which it fixed the date, either of the commencement or cessation of the disability to sue growing out of the events of the war. For we are of opinion that the period of twelve months which the contract allowed the plaintiff for bringing his suit, does not open and expand itself so as to receive within it three or four years of legal disability created by the war, and then close together at each end of that period so as to complete itself, as though the war had never occurred.

It is true that, in regard to the limitation imposed by statute, this Court has held that the time may be so computed, but there the law imposes the limitation and the law imposes the disability. It is nothing, therefore, but a necessary legal logic that the one period should be taken from the other. If the law did not, by a necessary implication, take this time out of that prescribed by the statute, one of two things would happen: either the plaintiff would lose his right of suit by a judicial construction of law which deprived him of the right to sue yet permitted the statute to run until it became a complete bar, or else, holding the statute under the circumstances to be no bar, the defendant would be left, after the war was over, without the protection of any limitation whatever. It was, therefore, necessary to adopt the time provided by the statute as limiting the right to sue, and deduct from that time the period of disability.

Such is not the case as regards this contract. The defendant has made its own special and hard provision on that subject. It is not said, as in a statute, that a plaintiff shall have twelve months from the time his cause of action accrued to commence suit, but twelve months from the time of loss; yet by another condition the loss is not payable until sixty days after it shall have been ascertained and proved. The condition is that no suit or action shall be sustainable unless commenced within the time of twelve months next after the loss shall occur, and in case such action shall be commenced after the expiration of twelve months next after such loss, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim. Now, this contract relates to the twelve months

next succeeding the occurrence of the loss and the Court has no right, as in the case of a statute, to construe it into a number of days equal to twelve months, to be made up of the days in a period of five years in which the plaintiff could lawfully have commenced his suit. So also if the plaintiff shows any reason which in law rebuts the presumption, which, on the failure to sue within twelve months, is, by the contract, made conclusive against the validity of the claim, that presumption is not revived again by the contract. It would seem that when once rebutted fully nothing but a presumption of law or presumption of fact could again revive it. There is nothing in the contract which does it, and we know of no such presumptions of law. Nor does the same evil consequence follow from removing absolutely the bar of the contract that would from removing absolutely the bar of the statute, for when the bar of the contract is removed there still remains the bar of the statute, and though the plaintiff may show by his disability to sue a sufficient answer to the twelve months provided by the contract, he must still bring his suit within the reasonable time fixed by the legislative authority—that is, by the Statute of Limitations.

We have no doubt that the disability to sue imposed on the plaintiff by the war relieves him from the consequences of failing to bring suit within twelve months after the loss, because it rendered a compliance with that condition impossible, and removes the presumption which that contract says shall be conclusive against the validity of the plaintiff's claim. That part of the contract, therefore, presents no bar to the plaintiff's right to recover.

As the Circuit Court founded its judgment on the proposition that it did, that judgment must be reversed and the case remanded for a new trial

NEW YORK LIFE INSURANCE COMPANY *v.* STATHAM ET AL.
SAME *v.* SEYMS.

MANHATTAN LIFE INSURANCE COMPANY *v.* BUCK, EXECUTOR.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1876.

[*Reported in* 93 *United States Reports* 24.]

THE first of these cases is here on appeal from, and the second and third on writs of error to, the Circuit Court of the United States for the Southern District of Mississippi.

The first case is a bill in equity, filed to recover the amount of a policy of life assurance, granted by the defendant (now appellant) in 1851, on the life of Dr. A. D. Statham, of Mississippi, from the proceeds of certain funds belonging to the defendant attached in the hands of its agent at Jackson, in that State. It appears from the statements of the bill that the annual premiums accruing on the policy were all regularly paid, until the breaking out of the late civil war, but that in consequence of that event the premium due on December 8th, 1861, was not paid ; the parties assured being residents of Mississippi, and the defendant a corporation of New York. Dr. Statham died in July, 1862.

The second case is an action at law against the same defendant to recover the amount of a policy issued in 1859 on the life of Henry S. Seyms, the husband of the plaintiff. In this case also the premiums had been paid until the breaking out of the war, when, by reason thereof, they ceased to be paid, the plaintiff and her husband being residents of Mississippi. He died in May, 1862.

The third case is a similar action against the Manhattan Life Insurance Company of New York, to recover the amount of a policy issued by it in 1858, on the life of C. L. Buck, of Vicksburg, Miss.; the circumstances being substantially the same as in the other cases.

Each policy is in the usual form of such an instrument, declaring that the company, in consideration of a certain specified sum to it in hand paid by the assured, and of an annual premium of the same amount to be paid on the same day and month in every year during the continuance of the policy, did

assure the life of the party named, in a specified amount, for the term of his natural life. Each contained various conditions, upon the breach of which it was to be null and void ; and among others the following : " That in case the said [assured] shall not pay the said premium on or before the several days hereinbefore mentioned for the payment thereof, then and in every such case the said company shall not be liable to the payment of the sum insured, or in any part thereof, and this policy shall cease and determine." The Manhattan policy contained the additional provision that, in every case where the policy should cease or become null and void, all previous payments made thereon should be forfeited to the company.

The non-payment of the premiums in arrear was set up in bar of the actions ; and the plaintiffs respectively relied on the existence of the war as an excuse, offering to deduct the premiums in arrear from the amounts of the policies.

The decree and judgments below were against the defendants.

Matthew H. Carpenter and *James A. Garfield* for the appellant in the first case, and for the plaintiff in error in the second.

Clinton L. Rice for the appellees in the first case, and *Joseph Casey* for the defendant in error in the second.

Bradley, J., after stating the case, delivered the opinion of the Court.

We agree with the Court below, that the contract is not an assurance for a single year, with a privilege of renewal from year to year by paying the annual premium, but that it is an entire contract of assurance for life, subject to discontinuance and forfeiture for non-payment of any of the stipulated premiums. Such is the form of the contract, and such is its character. It has been contended that the payment of each premium is the consideration for insurance during the next following year, as in fire policies. But the position is untenable. It often happens that the assured pays the entire premium in advance, or in five, ten, or twenty annual instalments. Such instalments are clearly not intended as the consideration for the respective years in which they are paid ; for, after they are all paid, the policy stands good for the balance of the life insured, without any further payment. Each instalment is, in fact, part consideration of the entire insurance for life. It is the same thing, where the annual premiums are spread over the whole life. The value of assurance for one year of a man's life when he is young, strong, and healthy, is manifestly not the same as when he is old and decrepit. There is no proper relation between the annual premium and the risk of assurance for the year in which it is paid. This idea of assurance from

year to year is the suggestion of ingenious counsel. The annual premiums are an annuity, the present value of which is calculated to correspond with the present value of the amount assured, a reasonable percentage being added to the premiums to cover expenses and contingencies. The whole premiums are balanced against the whole insurance.

But while this is true, it must be conceded that promptness of payment is essential in the business of life insurance. All the calculations of the insurance company are based on the hypothesis of prompt payments. They not only calculate on the receipt of the premiums when due, but on compounding interest upon them. It is on this basis that they are enabled to offer assurance at the favorable rates they do. Forfeiture for non-payment is a necessary means of protecting themselves from embarrassment. Unless it were enforceable, the business would be thrown into utter confusion. It is like the forfeiture of shares in mining enterprises, and all other hazardous undertakings. There must be power to cut off unprofitable members, or the success of the whole scheme is endangered. The insured parties are associates in a great scheme. This associated relation exists whether the company be a mutual one or not. Each is interested in the engagements of all ; for out of the co-existence of many risks arises the law of average, which underlies the whole business. An essential feature of this scheme is the mathematical calculations referred to, on which the premiums and amounts assured are based. And these calculations, again, are based on the assumption of average mortality, and of prompt payments and compound interest thereon. Delinquency cannot be tolerated nor redeemed, except at the option of the company. This has always been the understanding and the practice in this department of business. Some companies, it is true, accord a grace of thirty days, or other fixed period, within which the premium in arrear may be paid, on certain conditions of continued good health, etc. But this is a matter of stipulation or of discretion on the part of the particular company. When no stipulation exists, it is the general understanding that time is material, and that the forfeiture is absolute if the premium be not paid. The extraordinary and even desperate efforts sometimes made, when an insured person is *in extremis*, to meet a premium coming due, demonstrates the common view of this matter.

The case, therefore, is one in which time is material and of the essence of the contract. Non-payment at the day involves absolute forfeiture, if such be the terms of the contract, as is the case here. Courts cannot with safety vary the stipulation

of the parties by introducing equities for the relief of the insured against their own negligence.

But the Court below bases its decision on the assumption that, when performance of the condition becomes illegal in consequence of the prevalence of public war, it is excused, and forfeiture does not ensue. It supposes the contract to have been suspended during the war, and to have revived with all its force when the war ended. Such a suspension and revival do take place in the case of ordinary debts. But have they ever been known to take place in the case of executory contracts in which time is material? If a Texas merchant had contracted to furnish some Northern explorer a thousand cans of preserved meat by a certain day, so as to be ready for his departure for the North Pole, and was prevented from furnishing it by the civil war, would the contract still be good at the close of the war five years afterward, and after the return of the expedition? If the proprietor of a Tennessee quarry had agreed, in 1860, to furnish, during the two following years, 10,000 cubic feet of marble, for the construction of a building in Cincinnati, could he have claimed to perform the contract in 1865, on the ground that the war prevented an earlier performance?

The truth is, that the doctrine of the revival of contracts suspended during the war is one based on considerations of equity and justice, and cannot be invoked to revive a contract which it would be unjust or inequitable to revive.

In the case of life insurance, besides the materiality of time in the performance of the contract, another strong reason exists why the policy should not be revived. The parties do not stand on equal ground in reference to such a revival. It would operate most unjustly against the company. The business of insurance is founded on the law of averages; that of life insurance eminently so. The average rate of mortality is the basis on which it rests. By spreading their risks over a large number of cases, the companies calculate on this average with reasonable certainty and safety. Anything that interferes with it deranges the security of the business. If every policy lapsed by reason of the war should be revived, and all the back premiums should be paid, the companies would have the benefit of this average amount of risk. But the good risks are never heard from, only the bad are sought to be revived, where the person insured is either dead or dying. Those in health can get new policies cheaper than to pay arrearages on the old. To enforce a revival of the bad cases, while the company necessarily lose the cases which are desirable, would be manifestly unjust. An insured person, as before stated, does not stand

isolated and alone. His case is connected with and co-related to the cases of all others insured by the same company. The nature of the business, as a whole, must be looked at to understand the general equities of the parties.

We are of opinion, therefore, that an action cannot be maintained for the amount assured on a policy of life insurance forfeited, like those in question, by non-payment of the premium, even though the payment was prevented by the existence of the war.[1]

The decree in the equity suit and the judgments in the actions at law are reversed, and the causes respectively remanded to be proceeded with according to law and the directions of this opinion.

WAITE, C.J. I agree with the majority of the Court in the opinion that the decree and judgments in these cases should be reversed, and that the failure to pay the annual premiums as they matured put an end to the policies, notwithstanding the default was occasioned by the war.[1]

STRONG, J. While I concur in a reversal of these judgments and the decree, I dissent entirely from the opinion filed by a majority of the Court. I cannot construe the policies as the majority have construed them. A policy of life insurance is a peculiar contract. Its obligations are unilateral. It contains no undertaking of the assured to pay premiums; it merely gives him an option to pay or not, and thus to continue the obligation of the insurers, or terminate it at his pleasure. It follows that the consideration for the assumption of the insurers can in no sense be considered an annuity consisting of the annual premiums. In my opinion, the true meaning of the contract is, that the applicant for insurance, by paying the first premium, obtains an insurance for one year, together with a right to have the insurance continued from year to year during his life, upon payment of the same annual premium, if paid in advance. Whether he will avail himself of the refusal of the insurers or not is optional with him. The payment *ad diem* of the second or any subsequent premium is, therefore, a condition precedent to continued liability of the insurers. The assured may perform it or not, at his option. In such a case, the doctrine that accident, inevitable necessity, or the act of God, may excuse performance, has no existence. It is for this reason that I think the policies upon which these suits were brought were not in force after the assured ceased to pay premiums. And so, though for other reasons, the majority of the Court holds.[1]

[1] Only so much of the opinion is given as relates to this question.—ED.

CLIFFORD, J., with whom concurred HUNT, J., dissenting.

Where the parties to an executory money-contract live in different countries, and the governments of those countries become involved in public war with each other, the contract between such parties is suspended during the existence of the war, and revives when peace ensues; and that rule, in my judgment, is as applicable to the contract of life insurance as to any other executory contract. Consequently I am obliged to dissent from the opinion and judgment of the Court in these cases.

SECTION III.—WAIVER OF PERFORMANCE OF CONDITIONS.

TOMPSON *v.* NOEL.

IN THE KING'S BENCH, MICHAELMAS TERM, 1660.

[*Reported in* 1 *Levinz* 16.]

COVENANT brought, and declares, that the plaintiff covenanted to go with a ship to D. in Ireland, and there to take in 280 men from the defendant, and to carry them to Jamaica; and the defendant covenanted to have the 280 men there ready, and to pay for the carriage of them £5 a man, and says, that the defendant had not the 280 men ready, but that he had 180, and those he took and carried, and the defendant had not paid for them. The defendant pleads that he had the 280 men ready, and tendered them to the plaintiff, and that he would not receive them, but says nothing to the carrying of 180 men, nor to the non-payment for them, and for that it was not a plea to the whole, but to the carrying only. Judgment was given for the plaintiff upon a demurrer.

PHILLIPS AND COLBY CONSTRUCTION COMPANY *v.* SEYMOUR ET AL.

IN THE UNITED STATES SUPREME COURT, OCTOBER TERM, 1875.

[*Reported in* 91 *United States Reports* 646.]

ERROR to the Circuit Court of the United States for the Northern District of Illinois.

Thomas Dent and *Edwin H. Abbot* for the plaintiff in error.

Jeremiah S. Black and *H. K. Whiton* for the defendant in error.

MILLER, J., delivered the opinion of the Court.

The plaintiff in error, who was defendant in the Circuit Court, is a corporation organized under the laws of Wisconsin. It had undertaken to build the whole or a large part of the Wisconsin Central Railroad, and had made contracts with the defendants in error, whom we shall hereafter call plaintiffs, as they were in the Circuit Court, for the construction of a part of this road. These contracts were drawn with the minuteness of detail usual in such cases, and provided, among other things, that payments should be made by defendant, as the work progressed, on estimates made monthly by the engineer of the railroad company, on the fifteenth day of each month, for all the work done the previous month, except fifteen per cent retained by defendant as security for performance on the part of plaintiffs until the work was completed.

The plaintiffs brought their action of covenant on these contracts, alleging that they had commenced the work in the month of July, 1872, shortly after the contracts were signed, and prosecuted it vigorously until some time in December; that defendant had failed to pay the large sums due by the estimates for work done in October and November; and, seeing no prospect of payments, plaintiffs were compelled to abandon the work, and bring this suit. They assert a claim for all the work done as estimated, and for various items of damage suffered by them in consequence of this failure of defendant to comply with its covenant to pay as agreed.

A demurrer to this declaration having been overruled, defendant filed fifteen pleas in bar; also an amended plea; and on these numerous issues of fact were finally joined.

A verdict and judgment were rendered in favor of plaintiffs for $119,061.46; to reverse which this writ of error is brought.[1]

We can only try to respond to such points made by counsel as seem to be material to the judgment which we must render.

Before we proceed to this examination, however, it may be as well to say, that, in addition to a general verdict in favor of plaintiffs for $107,353.44, the jury made three special findings on matters suggested by the Court. These are:

First, that, at the time of the alleged breach of covenant by defendant, it had waived or excused the failure of plaintiffs up to that time to complete certain parts of their work within the times stipulated in the contract; and that plaintiffs were at the time of said breach engaged in the performance of said work, with the consent of defendant.

Second, that defendant, at the time plaintiffs stopped the

[1] A portion of the opinion relating to a question of practice has been omitted.—ED.

work, had given plaintiffs to understand that defendant was financially unable to pay the estimates for work then done, and would probably be unable for a time to pay future monthly instalments.

Third, that defendant had agreed to pay plaintiffs the extra cost of doing the earth-work by train on certain sections, and that the amount of this extra cost was $11,708.[1]

These findings must be presumed to be in accordance with the facts, and must stand as foundations for the judgment of the Court, unless it can be shown that they are affected by some erroneous ruling of the Court in regard to the admission of evidence or instructions to the jury.

We now proceed to notice such objections to the rulings of the Circuit Court as we deem of sufficient importance to require it.

First, it is said that the declaration is fatally defective because it does not aver that the plaintiffs were ready, willing, and able to perform the covenants on their part to be performed by the contract. It is true that this might have been alleged in more formal and apt terms than it is. But they do aver, that, from the time they entered upon the work in July until December 15th—the day of the alleged breach on the part of defendant—they prosecuted the same with all the energy and skill they possessed, having men in large numbers—to wit, more than 1000—with suitable teams and other equipments, along the whole line of the road of 160 miles; and that defendant had expressed entire satisfaction with the manner in which plaintiffs were doing the work.

We are inclined to think, that, coupled with the allegation that defendant was in default for non-payment for work actually done, this was sufficient. It is not like a case where a plaintiff has done nothing, but is required to put a defendant in default by offering to perform, or showing a readiness to perform. Plaintiffs here had already performed, and the defendant failed to do its corresponding duty under the contract; and, defendant having defaulted on a payment due, plaintiffs are not required to go on at the hazard of further loss

Second, by the terms of the contract, plaintiffs bound themselves to complete the first section, of forty miles, by September 1st; the third section, of twenty miles, by the 15th day of the same month; the fourth section, of twenty miles, by November 15th; and so on; and it is conceded that no one of these sections was completed within the time prescribed. It was also agreed, that if plaintiffs failed in this respect, or failed

[1] So much of the opinion as relates to this finding has been omitted.—ED.

in the opinion of the engineer-in-chief of the railroad company to prosecute the work with sufficient vigor to completion according to the terms of the contract, the defendant might declare it abandoned, and the amount retained out of the monthly estimates forfeited. This was 15 per cent of each monthly estimate, which, by the agreement, was retained by defendant as security for the due progress of the work.

The main proposition, underlying the whole argument of the defence on the general merits, is, that these covenants to complete certain sections within a definite time, and the covenant to pay, are mutual and dependent covenants; and that time is so far of the essence of this covenant of plaintiffs, that they can recover nothing, because they completed nothing within the specified time.

Where a specified thing is to be done by one party as the consideration of the thing to be done by the other, it is undeniably the general rule that the covenants are mutual, and are dependent, if they are to be performed at the same time; and if, by the terms or nature of the contract, one is first to be performed as the condition of the obligation of the other, that which is first to be performed must be done, or tendered, before that party can sustain a suit against the other. There is no doubt that in this class of contracts, if a day is fixed for performance, the party whose duty it is to perform or tender performance first must do it on that day, or show his readiness and willingness to do it, or he cannot recover in an action at law for non-performance by the other party.

But, both at common law and in chancery, there are exceptions to this rule, growing out of the nature of the thing to be done and the conduct of the parties. The familiar case of part performance, possession, etc., in chancery, where time is not of the essence of the contract, or has been waived by the acquiescence of the party, is an example of the latter; and the case of contracts for building houses, railroads, or other large and expensive constructions, in which the means of the builder and his labor become combined and affixed to the soil, or mixed with materials and money of the owner, often afford examples at law.

If A. contract to deliver a horse to B. on Monday next, for which B. agrees to pay $100, A. cannot recover by an offer to deliver on Tuesday; but if A. agree to deliver a horse, buggy, and harness on Monday, and B. accepts delivery of the horse and buggy, can he refuse to pay anything, though he accepts delivery of the harness on Tuesday? This is absurd. He waives, by this acceptance, the point of time as to the harness,

at least so far as A.'s right to recover the agreed sum is concerned. If B. have suffered any damage by the delay, he can recover it by an action on A.'s covenant to deliver on Monday ; or, if he wait to be sued, he may recoup by setting it up in that action as a cross-demand growing out of the same contract.

Such we understand to be especially the law applicable to building contracts.

If the builder has done a large and valuable part of the work, but yet has failed to complete the whole or any specific part of the building or structure within the time limited by his covenant, the other party, when that time arrives, has the option of abandoning the contract for such failure, or of permitting the party in default to go on. If he abandons the contract, and notifies the other party, the failing contractor cannot recover on the covenant, because he cannot make or prove the necessary allegation of performance on his own part. What remedy he may have in *assumpsit* for work and labor done, materials furnished, etc., we need not inquire here ; but if the other party says to him, " I prefer you should finish your work," or should impliedly say so by standing by and permitting it to be done, then he so far waives absolute performance as to consent to be liable on his covenant for the contract price of the work when completed.

For the injury done to him by the broken covenant of the other side, he may recover in a suit on the contract to perform within time ; or, if he wait to be sued, he may recoup the damages thus sustained in reduction of the sum due by contract price for the completed work.

It is said on the other side in this case, that the right of the defendant to abandon the contract, and retain in its hands the 15 per cent., is its only remedy, and that that has been waived. We need not decide this point here ; for we are only answering the argument that plaintiffs have lost all right to sue on the contract by their failure to complete the sections in the times named.

As it is perfectly clear from the testimony that defendant, at the time these several sections should have been completed, made no point of the failure to do so, but urged the plaintiffs to go on, expressed satisfaction at the manner in which the work was progressing, and paid the estimate after such failure, the verdict of the jury, that defendant had waived strict performance as to time, was so far well founded as to enable plaintiffs to recover for work actually done.

The judgment of the Circuit Court must be reversed, with direction to the court below to set aside the special verdict of

the jury for the $11,708, and to enter a judgment in favor of plaintiffs on the general verdict of $107,353.44, with interest from the day it was rendered ; and the plaintiff in error is to recover costs in this Court.

If, however, the defendants in error shall within a reasonable time, during the present term of this Court, file in the Circuit Court a *remittitur* of so much of the judgment of that Court in their favor as is based on the special verdict, and produce here a certified copy of the *remittitur*, the judgment of that Court will be affirmed.

JONES AND ANOTHER, ASSIGNEES OF GARDINER, A BANKRUPT, *v.* BARKLEY.

IN THE KING'S BENCH, JUNE 19, 1781.

[*Reported in Douglas* 684.]

THIS was a special action on the case, for non-performance of an agreement.

The first count of the declaration—after reciting that the plaintiffs, as assignees of Gardiner, were entitled to the equity of redemption of £1490 bank stock, which was in mortgage to one Lane for securing a sum of money lent by him to the bankrupt, and that the defendant was desirous that this equity of redemption should be assigned to Lane by the plaintiffs, and that they should execute, to Lane, a general release of all claims and demands which they, as assignees, had upon him—stated the agreement to have been, " That, on Gardiner's having his certificate confirmed by the Lord Chancellor, and the plaintiffs assigning to Lane, or any person he should appoint so far as in them lay, the equity of redemption of the said capital stock mortgaged to the said Lane, and also executing to him a general release of all claims and demands, which they, as assignees, had on him, the defendant should pay, and promised to pay (four months after the certificate should be confirmed by the Chancellor, and on the plaintiffs' assigning the equity of redemption as aforesaid, of the said stock, to Lane, or any person he should appoint, and executing and delivering such general release) the sum of £611 to the plaintiffs, for the benefit of the creditors of the bankrupt." Then, after stating that, in consideration of the promise and undertaking of the plaintiffs to perform all their part of the agreement, the defendant promised and undertook to fulfil all his part of it, the plaintiffs averred, " That, afterward, viz., on July 19th, 1774, the

bankrupt's certificate was allowed and confirmed by the Chancellor; that the plaintiffs, at all times since the making of the agreement, had been ready and willing, and at the expiration of four months from the time of the certificate being confirmed by the Chancellor, viz., on November 20th, 1774, offered to the defendant to assign, as far as in them lay, the said equity of redemption, etc., and to execute and deliver to the said Lane a general release, etc., and did then and there tender to the defendant a draft of such assignment and release to the said Lane, for his, the said defendant's, approbation thereof, and did then and there offer to execute and deliver, and would then and there have executed and delivered, to the said defendant, such assignment and release, but that the said defendant, then and there, absolutely discharged the plaintiffs from executing the same, or any assignment or release whatsoever. Yet the defendant, not regarding, etc., did not, four months after the said certificate had been confirmed by the Chancellor, nor, at any time before, nor since, although often requested, pay the said sum of £611, or any part thereof, to the plaintiffs." There was another count nearly to the same purpose.

The defendant pleaded: First, the general issue. Second, to the first count, "That the said plaintiffs did never execute an assignment of the said equity of redemption, to the said Lane, or any person he appointed, and a general release to the said Lane, of all claims and demands which they, as assignees, had on him, at the time of making the agreement, and deliver or tender such assignment and general release so executed, to the said Lane, or the said defendant." Third, a like plea to the second count.

To these special pleas the defendant demurred, and showed for cause, in the demurrer to the plea to the first count, that the defendant had not, by his plea, traversed or denied, or attempted to put in issue, any matter of fact alleged by the plaintiffs, but had introduced and attempted to put in issue matters of fact not alleged, nor necessary to be alleged, and that the plea was no answer to the said first count, but evasive and argumentative; and the same to the plea to the second count.

Le Blanc for the plaintiffs.

Wood for the defendant.

Lord MANSFIELD. If ever there was a clear case, I think the present is. One needs only state what the agreement, tender, and discharge were, as set forth in the declaration. It charges that the plaintiffs offered to assign, and to execute and deliver a general release, and tendered a draft of an assignment and

release, and offered to execute and deliver such assignment, but the defendant absolutely discharged them from executing the same, or any assignment and release whatsoever. The defendant pleads that the plaintiffs did not actually execute an assignment and release; and the question is, whether there was a sufficient performance. Take it on the reason of the thing. The party must show he was ready; but if the other stops him on the ground of an intention not to perform his part, it is not necessary for the first to go farther, and do a nugatory act. Here, the draft was shown to the defendant for his approbation of the form, but he would not read it, and, upon a different ground, namely, that he means not to pay the money, discharges the plaintiffs from executing it.

WILLES and ASHHURST, JJ., of the same opinion.

Judgment for the plaintiff.[1]

MARY SHORT *v.* STONE.

IN THE QUEEN'S BENCH, JANUARY 20, 1846.

[*Reported in* 8 *Queen's Bench* 358.]

ASSUMPSIT. The declaration stated that heretofore, to wit, on, etc., "in consideration that the plaintiff, being then unmarried, at the request of the defendant, had then promised the defendant to marry him, the defendant, he, the defendant, then promised the plaintiff to marry her within a reasonable time next after he should be thereunto requested by the plaintiff so to do; and the plaintiff avers that she, confiding in the said promise of the defendant, had always hitherto remained and continued, and still is, sole and unmarried, and was always, from the time of the making of her said promise until the marriage of the said defendant as hereinafter mentioned, ready and willing to marry the defendant, whereof the defendant hath always had notice; yet the defendant, disregarding his said promise, after the making thereof and before the commencement of this suit, to wit, on," etc., "wrongfully and injuriously married a certain other person, to wit, one Edith Collins, contrary to his said promise: to the damage," etc.

Plea 2.[2] "Defendant says that he was not at any time before

[1] The concurring opinion of Buller, J., has been omitted.—ED.

[2] The other pleas were: 1. *Non-assumpsit.* Issue thereon. 3. That, before breach, and before action brought, to wit, on, etc., plaintiff and defendant mutually agreed that the contract should be rescinded, and they be respectively discharged, etc., and they did then respectively discharge each other, etc., and the contract was accordingly rescinded: verification. Replication, denying the agreement and rescinding. Issue thereon.

the commencement of this suit requested by the plaintiff to marry her according to his said promise in that behalf." Verification.

Demurrer, assigning for causes, among others, that the plea confesses, but does not sufficiently avoid, and defendant has therein alleged a fact wholly immaterial to the merits; "for, inasmuch as it appears by the declaration that the defendant, before the commencement of the suit, had married another person, the plaintiff need not nor ought not to have requested the defendant to marry her." Also, that the plea "tenders too large and an insufficient issue, to wit, whether a request were made before the commencement of this suit; whereas, if the request be material at all, it should have been alleged not to have been made before the marriage of the defendant; for if the plaintiff were to traverse the allegation as it now stands in the said plea, and the same should be found for her, still it would not show conclusively that she was and is entitled to maintain her action, as it would be consistent with the said issue, and verdict thereon, that the request found to have been made by the plaintiff was after the said marriage, and between it and the commencement of this suit." Also that the plea should have concluded to the contrary.

Joinder in demurrer.

Peacock for the plaintiff.

Butt contra.

Peacock in reply.

Lord DENMAN, C.J. We must look at this case with a view to the feelings and intentions of the parties at the time of entering into such a contract; and the intention clearly is, to marry in the state in which the parties respectively are at the time. If either party puts himself out of that state, he must be taken to dispense with the contract so far that the other may have an action against him without a request to marry. It is unnecessary to inquire what cases, among those which have been mentioned, are analogous to this, because here the intent must be considered; and, looking to that, the fact stated on the record is a necessary dispensation. According to this, which appears to me the true construction of the contract, the plaintiff shows a good right of action, and is entitled to judgment.

Judgment for plaintiff.[1]

[1] The concurring opinions of Patteson, Coleridge, and Wightman, JJ., have been omitted.—ED.

RIPLEY *v.* McCLURE.

In the Exchequer, July 6, 1849.

[*Reported in* 4 *Exchequer* 344.]

Assumpsit. The declaration stated, that on, etc., by a certain agreement in writing then made between the plaintiff, a merchant carrying on business at Liverpool, and the defendant, a merchant carrying on business at Belfast in Ireland, the plaintiff agreed to sell and the defendant agreed to buy, on arrival, one-third interest in a cargo of congou tea by the ship called the Mary Ann Webb, to include only such part as might be consigned to and for account of the plaintiff, or of certain persons carrying on business by and under the name, style, and firm of Thomas Ripley & Co.; and it was by the said agreement then further agreed between the plaintiff and the defendant, that the said cargo should consist principally of certain descriptions of tea, in and by the said agreement indicated by certain terms in that behalf, etc.; that is to say, 430 chests congou, etc. And it was thereby then further agreed, that the said tea should be delivered in Belfast from the said ship, to wit, to the defendant; and that the rate of freight should be £6 per ton; and that the cost of the said tea should be at invoice rate, with all charges in China, including a commission of not exceeding 2½ per cent at an exchange of 5*s.* 3*d.* per dollar; and that insurance and charges of landing and warehouse in Belfast should be put to the debit of the account sales; and that payment for the same should be made equal to four months' cash from the last delivery in Belfast; and that the same agreement should be annulled and of no effect if the following circumstances collectively or separately occurred; that is to say, non-arrival, any engagement made in China that might prevent the plaintiff from carrying it out, the vessel being directed to another port without power of change on the part of the plaintiff, or any other cause that could not at the time of the making of the said agreement be explained, but what was then perfectly unknown to the plaintiff; and that the tea should be taken at the usual weights, taxes, and allowances in China as per invoice, and insurance to be done thereon at the rate of 5*s.* per dollar, to pay average in the usual way; and that sales should be made by the defendant of the entire parcel as a joint concern through and through, in the proportions specified—one third the defendant's and two thirds the plain-

tiff's, on usual terms ; and that advice should be transmitted to the defendant, as soon as received, of the arrangements made in China respecting the landing and destination of the said ship, so that if there should be any obstacle to the carrying out of that contract, in the vessel having been fixed without power of change, that agreement might be declared cancelled. The declaration then alleged mutual promises, and averred, that afterward, to wit, on, etc., insurance was done by the plaintiff on the said tea at the rate of 5*s.* per dollar, to pay average in the accustomed way ; and that, afterward, to wit, on September 20th, 1847, A.D., the said ship arrived at Belfast with a cargo of congou tea consigned to and for account of the plaintiff, and consisting principally of such descriptions of tea as in and by the said agreement indicated as aforesaid, and amounting to a large quantity, to wit, 600 tons of congou tea ; that on the arrival of the said cargo at Belfast the plaintiff was ready and willing to deliver the said cargo in Belfast to the defendant, according to and for the purposes of the said agreement, and so that sales should and might be made by the defendant, upon the terms of and according to the said agreement, of the whole of the said cargo, as a joint concern through and through, in the proportions specified in the said agreement, to wit, one third the defendant's and two thirds the plaintiff's, on usual terms ; and although advice was transmitted by the plaintiff to the defendant, as soon as received by the plaintiff, of the arrangements made in China respecting the lading and destination of the said ship, so that if there had been any obstacle to the carrying out the said agreement, or the said ship had been fixed without power of change, the said agreement might have been declared cancelled ; and although no such obstacle ever existed ; and although the circumstances, on the occurrence of which, collectively or separately, the said agreement was according to the terms thereof to be cancelled and of no effect, did not nor did any or either of them, collectively or separately, occur ; and although, if the defendant would have observed the said agreement and his said promise, the said cargo of congou tea would have been delivered in Belfast aforesaid to the defendant, according to the said agreement, and the last delivery thereof would have been made more than four months before the commencement of this suit, and the sales of the cargo by the defendant would have been made and completed long before the commencement of this suit ; and although the plaintiff, from the time of the said agreement and promise continually until and at and after the arrival of the said ship with the cargo at Belfast, was willing and desirous that

the said cargo should be delivered in Belfast to the defendant, for the purposes of and according to the said agreement, and should be sold by the defendant, according to the same agreement, and that the same agreement should in all respects be observed, performed, and fulfilled, yet the defendant, before the arrival of the ship with the cargo at Belfast, wholly discharged the plaintiff from delivering the said cargo, according to and for the purposes of the said agreement, in Belfast or to the defendant, and then and thenceforth continually wholly refused to buy the said one-third interest in the said cargo, or to pay for the same interest, according to the said agreement, or otherwise howsoever, or to receive or sell the said cargo, according to and upon the terms of the said agreement, or in any respect whatever to observe, perform, and fulfil the said agreement, and has not received or sold the said cargo, according to or for the purposes of the said agreement, nor paid or delivered any money, bill, note, or security whatsoever, for or in respect of the said third interest in the said cargo, or of any of the matters of the said agreement, etc.; concluding with special damage.

Pleas. First not *assumpsit*.

Secondly, that the cargo of tea was not, nor was any part thereof, consigned to or for account of the plaintiff, *modo et formâ*.

Thirdly, as to so much of the breach as relates to the discharging the plaintiff from the delivering the cargo, and refusing to buy and pay for the one-third interest in the cargo, to receive and sell the cargo, and to observe, perform, and fulfil the said agreement in manner as in the breach alleged, that the defendant did not discharge the plaintiff from delivering the cargo or any part thereof, or refused to buy or pay for the one-third interest in the said cargo or any part thereof, nor did the defendant refuse to receive or sell the cargo or any part thereof, or to observe, perform, or fulfil the agreement or any part thereof, *modo et formâ*.

Fourthly, as to so much of the breach as relates to the defendant having, before the arrival of the ship with the said cargo at Belfast, discharged the plaintiff from delivering the cargo, and refused to buy and pay for the one-third interest, and to receive and sell the cargo, and to observe, perform, and fulfil the said agreement in manner as in the breach alleged, that, within a reasonable time after the alleged discharge and refusal, and before the ship with the cargo arrived at Belfast, to wit, on, etc., the defendant retracted and withdrew the said discharge and refusal, whereof the plaintiff had notice; neverthe-

less, the plaintiff, from thence and on and ever after the arrival of the said ship with the cargo at Belfast, refused and neglected to deliver, and would not and did not deliver, to the defendant the said cargo or any part thereof, according to the said agreement, although the defendant was then ready and willing to receive the same, and the plaintiff ought to, and could and might have then delivered the cargo to the defendant ; and the defendant avers, that when he retracted and withdrew the said discharge and refusal, and also when the plaintiff had notice of such retraction and withdrawal of the said discharge and refusal, the ship with the cargo was on her voyage toward Belfast, and the plaintiff had not altered the voyage, course, or destination of the said ship or cargo or any part thereof, or sold or disposed of or dealt with the cargo or any part thereof ; nor had the plaintiff in any manner acted on the said discharge and refusal in the said breach mentioned.

Fifthly, as to the residue of the said breach, that the plaintiff was not ready or willing to deliver to the defendant the said cargo or any part thereof, *modo et formâ*.

Sixthly, that the agreement was made through the fraud of the plaintiff.

The plaintiff joined issue on the first, second, third, and fifth pleas, and replied to the fourth, that the defendant did not retract or withdraw the said discharge and refusal, or either of them, nor did the plaintiff refuse to deliver, nor was the defendant ready or willing to receive the said cargo or any part thereof, according to the said agreement, *modo et formâ*. To the sixth he replied, denying the fraud, on which last-mentioned replications issues were also joined.

At the trial before Coleridge, J., at the Liverpool Spring Assizes, 1849, the following facts appeared in evidence : The plaintiff was a merchant carrying on business at Liverpool in his own name, and also with another person at Ghanghae, in China, as commission agents, under the firm of Thomas Ripley & Co. The defendant carried on business as a merchant and general commission agent at Belfast, under the firm of William McClure & Son. On June 20th, 1846, the plaintiff and defendant entered into a joint adventure for importing a cargo of tea from China, in which the defendant was to have one-third interest. An investment in goods was to be made to purchase the tea, which was to be brought by the ship Mary Ann Webb, and consigned to the defendant at Belfast, for sale at the customary commission. On October 7th, 1846, the plaintiff wrote to the defendant enclosing invoice of shipment to China, and stating "the proceeds to be invested in tea for the Belfast

market, in which you are to take one-third interest." The plaintiff subsequently wrote to the defendant, representing that the adventure was likely to prove a loss, and offering to release him from his engagement. Some correspondence then took place, and ultimately this contract was annulled by mutual consent, and on March 16th, 1847, the agreement set out in the declaration was substituted. The defendant became dissatisfied with this agreement, and proposed to the plaintiff to cancel it, and set up the first contract. A long correspondence ensued, in which the defendant alleged that he had been induced to abandon the first contract and enter into the subsequent agreement by reason of the misrepresentations of the plaintiff. On July 1st, 1847, the plaintiff sent to the defendant copies of the invoices of the tea in a letter containing the following passage: "I have had it from yourself, that you do not intend to comply with the conditions of the contract for the purchase of one third of this cargo, a threat which I am inclined to believe you do not intend to act upon. On this subject you will please give me your opinion in writing, and I shall be glad if you will assign your reasons for choosing such a course, when the contract on my part will be fulfilled to the letter." No answer having been returned to this letter, the plaintiff, on August 26th, again wrote to the defendant thus: "As regards the Mary Ann Webb, there is nothing left for me to do but to send her to some other port than Belfast, since you have declined to fulfil your contract." On the 30th the defendant wrote in reply: "As to the cargo of the Mary Ann Webb, to one third of which we still think we are entitled under our first contract, we observe you now intend to send it to a different port. I am willing, and, such being the case, I am glad this unpleasant matter should be thus ended; and I am willing to waive any claim I may have under either the first or second contract." In reply, the plaintiff wrote that it was not his intention to release the defendant from his contract of purchase. On September 1st the defendant wrote to the plaintiff as follows: "I give you notice, that I am entitled to have these teas delivered at Belfast, either under the first or second contract, and that if you fail to deliver them accordingly, I shall hold myself released from all contracts respecting them." On September 21st the Mary Ann Webb arrived in Belfast Lough with the cargo of tea on board; and the defendant, having been informed of it, wrote to the plaintiff, stating that he was "willing to dispose of the cargo and appropriate the proceeds according to the interests of both parties therein." The defendant also on the same day served the captain of the vessel

with a copy of this letter. In consequence, however, of directions from the plaintiff, the vessel sailed from Belfast on September 24th for London without delivering any portion of her cargo to the defendant. The copy of the invoice sent to the defendant was headed thus: "Invoice of congou tea shipped on board the Mary Ann Webb, Silk, master, for Belfast, and consigned to Thomas Ripley, Esq., Liverpool." It afterward appeared that, in the heading of the original invoice, the words "on account and risk of Messrs. McClure & Son and Thomas Ripley" were inserted after the word "Belfast." The bills of lading stated that the goods were bound for Belfast market, and consigned unto Thomas Ripley or his assignee.

It was submitted, on the part of the plaintiff, that the above correspondence proved that the defendant had refused to perform the contract declared on, and had discharged the plaintiff from delivering the tea at Belfast. On behalf of the defendant it was contended that he had not refused to perform the contract in question, and that, so far from discharging the plaintiff from delivering the tea at Belfast, he had insisted on the plaintiff delivering it there.

With respect to the second issue, the learned judge told the jury that the fact of the tea being stated to be shipped on the joint account did not preclude them from finding that they were consigned to the plaintiff, the invoicing them on the joint account having been done by mistake by the correspondent in China, who was ignorant of the fact of the first contract having been rescinded, and of the goods being consigned to the plaintiff, and coming home on the plaintiff's sole account.

The following questions were put by the learned judge in writing to the jury, who returned the accompanying answers:

First, Was the plaintiff guilty of any misrepresentation as to the circumstances connected with the former contract, by which the defendant was induced to enter into the second? No.

Second, Did the defendant at any time refuse to perform the second contract? Yes, by implication.

Third, Did the defendant ever withdraw that refusal before the ship arrived at Belfast? No.

Fourth, Was the plaintiff willing to deliver according to the second contract down to the time of the defendant's refusal to perform the contract? Yes, but not after the arrival of the vessel at Belfast, the defendant having repudiated the contract.

Fifth, To and on whose account were the teas consigned? Thomas Ripley.

On these findings the learned judge directed a verdict for the

defendant on the issue raised by the fifth plea, and for the plaintiff on the other issues.

Knowles, in Easter Term last, obtained a rule on the part of the defendant, for a new trial, on the ground of the verdict being against evidence, and also upon the following alleged grounds of misdirection: First, that the learned judge had told the jury, with reference to the letter of July 1st, in which the plaintiff demanded that the defendant should state in writing whether he intended to comply with the contract, that the plaintiff had a right to an answer from the defendant; secondly, that the learned judge was wrong in putting the question to the jury, whether the defendant at any time refused to perform his contract; but the question ought to have been, whether he did so refuse after the arrival of the vessel at Belfast; and that the learned judge was not correct in directing a verdict to be entered for the plaintiff on the third issue, upon the answers which had been returned by the jury; thirdly, that the mode in which the question was put to the jury as to the consignment of the teas to the plaintiff was improper. A rule was also obtained to arrest the judgment, on the ground that the fifth plea was found for the defendants, and was a complete answer to the action.

Martin and *J. Henderson* showed cause.

Knowles, *Crompton*, *Unthank*, and *Mellish* in support of the rule.

The judgment of the Court was now delivered by

PARKE, B. A motion for a new trial was made in this case, on the ground of misdirection, and the verdict being against evidence. Also a motion to arrest the judgment, on the ground that the issue on the fifth plea was found for the defendant, and was an answer to the action. (After stating the pleadings, his lordship proceeded): According to the statement of the contract in the declaration, and as it was proved, it was an executory contract to purchase one third of a cargo of teas exported from China, capable of being ascertained, such purchase to be made on certain contingencies, viz., the arrival of the cargo at Belfast, the absence of previous contracts in China affecting the cargo, and other circumstances mentioned in the agreement. It is clear, therefore, that the property did not pass by the contract, and the delivery of the cargo by the plaintiff, as vendor, to the defendant, as vendee—not a mere readiness to deliver after arrival—was a condition precedent to the plaintiff's right to recover the price, for that price was payable, not on, but after delivery. It also appeared on the trial, and is a most important element in the considera-

tion of the case, and is a key to many ambiguous parts of the defendant's conduct in the transaction, that there had been before a contract of partnership in an outward adventure, and the cargo expected in return for it by the same vessel, for which the contract declared upon, being a contract of purchase and sale, was substituted. The liability to perform the contract of purchase, and its non-performance, not that for a partnership in a joint adventure, was the question in the case. One defence was fraud in obtaining the second contract by false representations as to the probable result of the first, which defence was not made out. The other is the one, with respect to which a misdirection is alleged to have taken place. This was in two particulars: the first was, that the question which the learned judge left to the jury, as to the non-performance of the contract, was, whether the defendant refused at any time to fulfil the second contract, not whether he refused after the arrival; and, secondly, that, as to the question whether he refused or not, the learned judge told the jury that the plaintiff had a right, before the arrival of the cargo, to a distinct answer whether the defendant would fulfil the contract or not.

As to the latter point, if this had been laid down as a proposition of law, it would certainly not have been correct. The defendant was not bound to do anything before the arrival. But it was contended, that this was only an observation made by my brother Coleridge on the facts, and amounted merely to this—that, in the intercourse of merchants under the circumstances of the case, a letter from the plaintiff to the defendant, containing a request for such an answer, ought to have been answered; and we do not think that my brother Coleridge meant to say more, nor that the jury could have understood him to do so. The other objection requires more consideration.

It was contended, for the defendant, that, to constitute a breach of the contract, a refusal at any time was insufficient; that it must be a refusal after the arrival of the cargo; and that the supposed refusal in July, to which the attention of the jury was said to have been directed, and which was long before the contract to buy became absolute, was no breach, and nothing more than an expression of an intention to break the contract, not final, and capable of being retracted. And we think that if the jury had been told that a refusal before the arrival of the cargo was a breach, that would have been incorrect. We think that point rightly decided in Philpotts *v.* Evans, 5 M. & W. 475.

But we cannot collect that the learned judge ever told the jury that a refusal at any time was a breach. He left the questions in writing, whether there was a refusal at any time, and

whether that refusal had been subsequently retracted ; and the jury having found, as we think they were warranted by the evidence to do, that it had not, there was certainly evidence of a continual refusal down to and inclusive of the time when the defendant was bound to receive, which would render the defendant liable, if all the conditions precedent had been performed or waived. But then it was said, and rightly, that the delivery of the cargo being a condition precedent, the plaintiff was bound to perform it, unless the defendant waived or discharged him from so doing. In the declaration there is an allegation, though informal, of such waiver or discharge, coupled with the allegation of refusal, and an issue upon it in the third plea, and the plaintiff, no doubt, was bound to prove that waiver or discharge ; we do not feel any difficulty in saying that there was ample evidence of such waiver in the conversation referred to the plaintiff's letter of July 1st, coupled with the whole tenor of the defendant's letters.

By an express refusal to comply with the conditions of the contract of purchase, the defendant must be understood to have said to the plaintiff, "You need not take the trouble to deliver the cargo to me, when it arrives at Belfast, as purchaser, for I never will become such ;" and this would be a waiver, at that time, of the delivery, and, if unretracted, would dispense with the actual delivery after arrival.

And if we look at the correspondence, it is to be inferred from it that the defendant never did mean to perform the contract of purchase at all, and, consequently, never retracted the waiver of the delivery by the plaintiff as a vendor. It is true that the defendant insists that the cargo shall be delivered at Belfast ; and even the alleged parol refusal was probably not intended to be, as Mellish, in his able and ingenious argument, with truth contended, any waiver of the delivery at Belfast—it may be taken that the defendant always meant that ; but the true question is not, whether the delivery at Belfast was waived, but whether the delivery under the second contract, that is, the contract of purchase and sale, was waived ; and we feel no doubt that the defendant, after he had formed the opinion that he had been deluded into a contract of purchase by false representations of the prospects of the original adventure in the first instance, wholly refused to be bound by the contract of sale, and thereby intended to waive the delivery under that contract, and never afterward retracted the waiver.

This was a question for the jury ; and we do not see any reason to think, from the report and the statements of the learned counsel on both sides, that the jury were not in sub-

stance properly directed as to the question for their decision ; and we are all quite satisfied with their verdict. As to the issue with respect to the consignment to the plaintiff, we think that the learned judge's direction was quite right.

With respect to the motion in arrest of judgment, we think that the verdict on the issue as to the residue is immaterial. If this residue is that part of the breach which is not answered either by the third plea or the fourth, it is in effect no part of the breach at all, for the third plea answers all ; there is nothing to plead to, and the plea is idle and irrelevant. If it means the residue not answered by the fourth plea, it is only the readiness and the willingness to deliver after the time that the delivery was excused, and the defendant refused to receive ; and readiness and willingness after that time is wholly immaterial. The verdict for the defendant is, therefore, upon an immaterial averment in the declaration.[1]

Rule discharged.

CORT & GEE *v.* THE AMBERGATE, NOTTINGHAM & BOSTON & EASTERN JUNCTION RAILWAY COMPANY.

IN THE QUEEN'S BENCH, MAY 27, 1851.

[*Reported in* 17 *Queen's Bench* 127.]

CASE. The declaration stated that, on December 14th, 1846, defendants, then being about constructing the above-named railway, required in that behalf, and advertised for, certain railway chairs to be supplied to them according to a certain specification then made and published by defendants, and containing and stating therein, etc. The specification was then set forth, describing the required make, weight, and composition of the chairs, and that "the quantity of chairs required was to be 900 tons of joint and 3000 tons of intermediate chairs, and which were to be delivered at such places and in such proportions as hereinafter described ; to wit, to be delivered out of barges and placed upon a wharf at Radcliffe-upon-Trent," etc. (other places of delivery for various quantities were then stated) ; "in the month of February, 1847, A.D., 60 tons at the

[1] The judgment of the Court was afterward affirmed, in the Court of error, upon the latter point.

Grantham Canal Wharf," etc. (naming quantities and places),[1] "in the month of March in the year aforesaid," etc.; the specification, as recited, then went on to require further deliveries at places and in quantities named, in April, and from thence monthly till November, 1847, inclusive, and again from January to May, 1848, inclusive. The tender was to state a price per ton; payments to be made by the directors of the company one month after delivery, on production of a certificate from the person appointed by the company to receive and inspect the chairs that the contract (for the portion) had been duly performed; the engineer to "have full power to alter the deliveries in any way or proportion to the different places before specified, by sending information to the contractor from time to time of the manner in which such deliveries were to be made:"[2] the contractor to be paid according to the prices set forth in his tender. The declaration then averred that plaintiffs, having notice of the premises, did thereupon afterward, viz., on, etc., propose to defendants to supply them with 3900 tons of cast-iron chairs manufactured from strong mixed iron, subject to the conditions and stipulations set forth in the said specification, and in such proportion of joint chairs to intermediate or single chairs as described therein as aforesaid, and also to deliver the same at such places and in such quantities as stated and described as aforesaid, free from every other charge, and at the rate, etc. (specifying the rates). And thereupon afterward, viz., on December 28th, 1846, by a certain contract or memorandum of agreement then made between plaintiffs of the one part and defendants of the other part, and then sealed with the common seal of the defendants and delivered so sealed as aforesaid to the plaintiffs, and which, etc. (profert), it was agreed by and between plaintiffs and defendants that plaintiffs should and would execute and perform the said proposal according to the conditions and stipulations therein set forth and referred to as aforesaid, and subject to the said specification. And defendants did thereby agree to pay plaintiffs for the said chairs after the rate and in manner above mentioned. Averment that plaintiffs afterward, viz., on, etc., and on divers other days, etc., did, in pursuance and part performance of the said contract on their part, deliver to defendants, and defendants did accept and receive of and from plaintiffs, 1787 tons of such chairs as aforesaid; and although

[1] The quantities were to be from 100 to 356 tons in the whole, per month: places of delivery, Grantham Canal Wharf, Bottesford Wharf, Radcliffe Wharf, High Bridge Wharf, and Boston.

[2] These words were taken nearly verbatim from the specification.

one month from the said respective deliveries of the said chairs had respectively elapsed before the commencement of this suit, and plaintiffs afterward, and after the expiration of one month as aforesaid, and before the commencement of this suit, viz., etc., produced such written certificates as aforesaid to the defendants in respect of the quantities of chairs so delivered as aforesaid, nevertheless defendants have not paid, etc., and a large sum, viz., £12,100, is due and unpaid from them to plaintiffs for and in respect of the said chairs so delivered, etc.

And plaintiffs further say that, although they were always, from the time of the making of the said contract until such refusal and wrongful discharge by defendants as hereinafter mentioned, and thence hitherto, ready and willing to execute and perform the said proposal according to the conditions and stipulations in that behalf aforesaid, and subject to the said specification, and to perform and fulfil the said contract in all things on their part and behalf to be performed and fulfilled, whereof, etc. (notice to defendants), and although defendants, in pursuance and part performance of the said contract on their part, have accepted and received of and from plaintiffs a certain quantity of the said chairs, to wit, 1787 tons thereof, and although the time so limited and appointed for the execution and performance of the said contract by plaintiffs as aforesaid hath long since elapsed, nevertheless defendant afterward, to wit, during the time so limited and appointed for the execution and performance of the said contract by plaintiffs as aforesaid, to wit, January 31st, 1848, wrongfully and injuriously and wholly refused, and have thence hitherto wholly refused, to accept or receive of or from plaintiffs the residue of the said chairs so agreed to be supplied to and received by defendants as aforesaid, or any part thereof, according to the form and effect of the said contract or otherwise howsoever, and then and have thence hitherto wholly and wrongfully prevented and discharged plaintiffs from supplying the said residue, and from the further execution and performance of the said contract by them, the plaintiffs. Whereby plaintiffs have lost all the profits, etc., and have been put to costs in providing, etc., for complete execution of the contract, and were obliged to discharge certain persons (named) from contracts which the plaintiffs had entered into with them for the supply of iron to be used by plaintiffs in making the said chairs, and to pay them compensation.

Plea 1. After *oyer* of the specification and agreement (the material parts of which appear sufficiently by the declaration). As to the first breach, except so far as the same relates to £159,

parcel, etc.; payment by defendants to plaintiffs, and acceptance by them in full satisfaction, etc.; verification.

Plea 2. As to the £159, payment into Court of that sum: which the plaintiffs accepted, and gave a written admission that it covered the balance due for chairs actually delivered.

Plea 3. As to so much of the said declaration as alleges that plaintiffs were ready and willing to execute and perform the said proposal according to the conditions and stipulations in that behalf aforesaid, and subject to the said specification, defendants say that plaintiffs were not ready and willing to execute and perform the said proposal according to the said conditions and stipulations and subject to the said specification, in manner and form, etc. Conclusion to the contrary. Issue thereon.

Plea 4. As to so much of the declaration as charges defendants with having, during the time limited and appointed for the execution and performance of the said contract by the plaintiffs, refused to accept or receive the said residue of the said chairs, and prevented and discharged the plaintiffs from supplying the said residue, and from the further execution and performance of the said contract by them, the plaintiffs, defendants say that they did not during the said last-mentioned time refuse to accept or receive the said residue, nor did they prevent or discharge the plaintiffs from supplying the said residue and from the further execution and performance of the said contract by the plaintiffs in manner and form, etc. Conclusion to the contrary. Issue thereon.

Replication to plea 1. That defendants did not pay, etc., nor did plaintiffs accept, etc., in manner and form, etc. Conclusion to the contrary. Issue thereon.

On the trial, before Coleridge, J., at the Nottingham Spring Assizes, 1851, it appeared that the plaintiffs, after the agreement declared upon, bought premises, made contracts for iron, and, at considerable expense, and by incurring various liabilities, put themselves in a situation to supply the 3900 tons of iron chairs. The supply was begun, but in September, 1847, when the plaintiffs' bookkeeper, Smith, called upon the company's engineer for money, the engineer, who used to give directions on their behalf as to the delivery of the chairs, requested that the plaintiffs would go on very slowly with the supply, as he did not know how to do, the calls not being paid, and he did not know how far the line would be carried out. Part of the line for which the chairs had been ordered (ending at Boston) was ultimately abandoned. In January, 1848, the engineer stopped the supply for a time, saying he would let

the plaintiffs know when more chairs were wanted. The plaintiffs' establishment for manufacturing the chairs was kept up during the suspension, which continued till August. Then the engineer said the company could take a few more, but plaintiffs were to go on slowly. They did so till February, 1849, and were then again stopped till April, when the engineer desired to have a boat load (if plaintiffs had as many) sent to Radcliffe Wharf, which was done. No more were sent or asked for till December, 1849, when Smith called upon the engineer for money, and he inquired whether plaintiffs had any chairs. Smith replied that they had some, which had been made a long time. The engineer said that, if plaintiffs had 100 tons, they might send them, but they were not to make any more, as they would not be wanted, for the defendants had as many as were necessary to carry the line to Grantham. Plaintiffs sent all they had, about 53 tons, and no more were sent or required afterward. During the supply the payments were not made punctually according to contract; nor had the plaintiffs delivered the stipulated quantities of chairs at the appointed times respectively; which omission on their part they attributed to the interruptions above stated. A large stock of iron remained on the plaintiffs' hands; and, besides loss in the disposal of it, they had to pay money for breaking off engagements which they had themselves made for the purpose of executing this work. The quantity of chairs delivered was 1787 tons.

In defence, an endeavor was made to show that the plaintiffs had not the requisite means to complete their contract, and that the delays and final cessation took place with their concurrence. It was also urged that the engineer was not shown to have had such authority as would make his acts binding on the company. These points were left to the jury, who decided them in favor of the plaintiffs.

It was further contended that the averment by plaintiffs in the declaration, of readiness and willingness to perform their contract, was not borne out, inasmuch as the plaintiffs had not offered to deliver, nor had ever made, the residue of the chairs; nor was it proved that the defendants had prevented and discharged plaintiffs from supplying such residue, since it did not appear that the company had impeded the delivery by any active interference, or had countermanded it under their seal or by any authoritative communication. On the first of these points, Coleridge, J., said: There is no evidence of any refusal to accept; no evidence of their having said, for example, "We insist upon your completing the contract, and, if you do not,

we shall bring an action." There is no offer to send the chairs, and no refusal to accept ; nor is there the slightest ground for believing that the plaintiffs have ever made these chairs ; but I think the law is not so unreasonable as to compel parties to be at the expense of making these chairs if those who contracted to purchase have in truth told them they would not accept them ; and I think the defendants had given very effective notice that they were not to be made. On the second point his lordship said, after reading the material statements of the witnesses : Upon this evidence you are to say whether or not the directors refused to accept. Why, they certainly have not in form ; but do they, by any intervention on their part, cause the plaintiffs not to go on to complete the delivery ? If you think that they did, then that issue, like the former, should be found for the plaintiffs ; but if you think not, then that issue should be found for the defendants. With respect to the authority of the engineer to suspend and stop the work, and the responsibility of the company for his directions, though not warranted under their seal, the learned judge observed : This contract was entered into under seal by the Ambergate Railway Company, a corporation, on the one part, who are under certain disabilities and disadvantages which do not attach to other people ; but the corporation all the way through seem to have been represented by certain individuals ; and the most important person with whom they (plaintiffs) have had to do is the engineer ; and I think rightly and properly, and that he was a necessary man to go between these parties. Without his certificate the plaintiffs could not get any money ; and before he would certify he would have to be satisfied that they had a perfectly flat chair.[1] I shall advise you very much to consider this case as one, in the particular parts to which I shall draw your attention, in which you should look upon everything done by the engineer as if it was done by the company itself, as far as the plaintiffs are concerned. As to the damages, his lordship said that the plaintiffs, if they had a verdict, were entitled to be put into the same situation as if they had completed their contract ; and he suggested modes in which the damage, upon the whole quantity undelivered, might be estimated, but without giving any actual direction upon this subject.

The learned judge read over to the jury the material parts of the evidence on all the points ; and they found a verdict for the plaintiffs, damages £1800.

[1] The specification required that the under side of the chair should be "perfectly flat and even on the surface."

Macaulay, in the ensuing Term, moved for a new trial on the ground of misdirection on the points of readiness and willingness, and of prevention ; and he also objected to the summing up as to the authority of the engineer, and on the question how far the plaintiffs were shown to have concurred in the stopping of their work. He cited West *v.* Blakeway,[1] Phillpotts *v.* Evans,[2] and Ripley *v.* McClure.[3] And he contended that the damages were excessive, inasmuch as the verdict was given in respect of all the chairs, whereas some had been undelivered on the appointed days, before the final stoppage, and without any compulsion upon the plaintiffs not to deliver them. A rule *nisi* was granted.

Humfrey and *Willmore* now showed cause.[4]

Macaulay and *Denison contra.*

Lord CAMPBELL, C.J., on a later day of the Term, June 4th, delivered the judgment of the Court.

We are of opinion that the verdict found for the plaintiffs ought not to be disturbed. As to the supposed misdirection : the learned judge at the trial did not direct the jury that in point of law the engineer had authority to bind the company, but only left it to the jury to consider whether, in point of fact, the company by their mode of dealing had authorized and sanctioned his acts. His lordship intimated that he thought the evidence was strong to show that they had done so, but that it was for the jury to give the evidence its due weight. The objection of misdirection therefore fails.

Next we have to consider whether the plaintiffs were entitled to a verdict on the issue whether they were ready and willing to execute and perform the said contract according to the said conditions and stipulations, in manner and form, etc.; and on the issue whether the defendants did refuse to accept or receive the residue of the chairs, or prevent or discharge the plaintiffs from supplying the said residue, and from the further execution and performance of the said contract. It is not denied that if the defendants would have regularly accepted and paid for the chairs, the plaintiffs would have gone on regularly making and delivering them according to the contract ; the objection is that, although the plaintiffs were desirous that the contract should be fully performed, yet, after receiving the notice that the company did not wish to have any more chairs, and would not accept any more, they ceased to make any more, insomuch that the residue which the company are alleged to

[1] 2 Man. & G. 729. [2] 5 M. & W. 475.

[3] 4 Exch. 345. See McClure *v.* Ripley, in Exch. Ch., 5 Exch. 140.

[4] Before Lord Campbell, C.J., Patteson, Coleridge, and Erle, JJ.

have refused to accept never were made. The defendants contend that, as the plaintiffs did not make and tender the residue of the chairs, they cannot be said to have been ready and willing to perform the contract; that the defendants cannot be charged with a breach of it; that, after the notice from the defendants, which in truth amounted to a declaration that they had broken and thenceforward renounced the contract, the plaintiffs, if they wished to have any redress, were bound to buy the requisite quantity of the peculiar sort of iron suited for these railway chairs, to make the whole of them according to the pattern, with the name of the company upon them, and to bring them to the appointed places of delivery and tender them to the defendants, who, from insolvency, had abandoned the completion of the line for which the chairs were intended, desiring that no more chairs might be made, and declaring, in effect, that no more should be accepted or paid for. We are of opinion, however, that the jury were fully justified upon the evidence in finding that the plaintiffs were ready and willing to perform the contract, although they never made and tendered the residue of the chairs. In common sense the meaning of such an averment of readiness and willingness must be that the non-completion of the contract was not the fault of the plaintiffs, and that they were disposed and able to complete it if it had not been renounced by the defendants. What more can reasonably be required by the parties for whom the goods are to be manufactured? If, having accepted a part, they are unable to pay for the residue, and have resolved not to accept them, no benefit can accrue to them from a useless waste of materials and labor, which might possibly enhance the amount of damages to be awarded against them.

Upon the last issue, was there not evidence that the defendants refused to accept the residue of the chairs? If they had said, "Make no more for us, for we will have nothing to do with them," was not that refusing to accept or receive them according to the contract? But the learned counsel for the defendants laid peculiar stress upon the words "nor did they prevent or discharge the plaintiffs from supplying the said residue" of the chairs "and from the further execution and performance of the said contract." We consider the material part of the allegation which the last plea traverses to be, that the defendants refused to receive the residue of the chairs. But, assuming that the whole must be proved, we think there is evidence to show that the defendants did prevent and discharge the plaintiffs from supplying the residue of the chairs, and from the further execution of the contract. It is contended that

"prevent" here must mean an obstruction by physical force; and, in answer to a question from the Court, we were told it would not be a preventing of the delivery of goods if the purchaser were to write, in a letter to the person who ought to supply them, "Should you come to my house to deliver them, I will blow your brains out." But may I not reasonably say that I was prevented from completing a contract by being desired not to complete it? Are there no means of preventing an act from being done, except physical force or brute violence? Again, we are told there can be no "discharge" by a corporation unless by deed under the corporate seal. Of a discharge in one sense of the word this is true. A discharge is sometimes used as equivalent to a release, which must be under seal; Brymer *v.* Thames Haven Dock & Railway Company.[1] But we conceive that, in the allegation traversed by the last plea, discharge only means, like prevent, that the act of the defendants was the cause of the residue of the chairs not being delivered, and of the contract not being further executed or performed. Taking the language employed in its natural and reasonable sense, there was abundant evidence to support the finding of the last issue for the plaintiffs.

It is averred, however, that there are express authorities to show that there could be no readiness and willingness to perform the contract unless all the chairs were finished and tendered; that to prevent must be by positive physical obstruction, and that there can be no discharging unless by instrument under seal.[2]

The most recent case cited by the defendants' counsel was Ripley *v.* McClure.[3] This case is very complicated in its circumstances; but the second point decided in it is the only one applicable to the question which we have to consider. There being an executory contract, whereby the plaintiff agreed to sell and the defendant to buy, on arrival, certain goods, to be delivered at Belfast at a certain price, payable on delivery, it was held that a refusal by the defendant before the arrival of the cargo to perform the contract was not of itself necessarily a breach of it, but that such refusal, unretracted down to and inclusive of the time when the defendant was bound to receive the cargo, was evidence of a continuing refusal and a waiver of the condition precedent of delivery, so as to render the defendant liable for the breach of contract. But, in the case at bar, the refusal never was retracted; and therefore there was a continuing breach down to the time when this action was commenced.

[1] 2 Exch. 549.

[2] A portion of the opinion has been omitted.—ED.

[3] 4 Exch. 345.

Upon the whole, we think we are justified, on principle and without trenching on any former decision, in holding that, when there is an executory contract for the manufacturing and supply of goods from time to time, to be paid for after delivery, if the purchaser, having accepted and paid for a portion of the goods contracted for, gives notice to the vendor not to manufacture any more as he has no occasion for them and will not accept or pay for them, the vendor having been desirous and able to complete the contract, he may, without manufacturing and tendering the rest of the goods, maintain an action against the purchaser for breach of contract ; and that he is entitled to a verdict on pleas traversing allegations that he was ready and willing to perform the contract, that the defendant refused to accept the residue of the goods, and that he prevented and discharged the plaintiff from manufacturing and delivering them.

We are likewise of opinion that, in this case, the damages are not excessive, as the jury were justified in taking into their calculation all the chairs which remained to be delivered, and which the defendant refused to accept. They were all included in the declaration and in the issues joined ; the time mentioned in the proposal for the delivery of some of them had arrived before the notice was given ; but the time of delivery was not of the essence of the contract ; and the obligation was still incumbent upon the defendants to accept the whole of the residue.

The rule must therefore be discharged.

Rule discharged.[1]

ALBERT HOCHSTER *v.* EDGAR FREDERICK DE LA TOUR.

In the Queen's Bench, June 25, 1853.

[*Reported in* 2 *Ellis & Blackburn* 678.]

Declaration, "for that, heretofore, to wit on 12th April, 1852, in consideration that plaintiff, at the request of defendant, would agree with the defendant to enter into the service and employ of the defendant in the capacity of a courier, on a certain day then to come, to wit, the 1st day of June, 1852, and to serve the defendant in that capacity, and travel with him on the Continent of Europe as a courier for three months certain

[1] See Hochster *v.* De la Tour, 2 E. & B. 678.

from the day and year last aforesaid, and to be ready to start with the defendant on such travels on the day and year last aforesaid, at and for certain wages or salary to wit," £10 per month of such service, "the defendant then agreed with the plaintiff, and then promised him, that he, the defendant, would engage and employ the plaintiff in the capacity of a courier on and from the said 1st day of June, 1852, for three months" on these terms; "and to start on such travels with the plaintiff on the day and year last aforesaid, and to pay the plaintiff" on these terms; averment that plaintiff, confiding in the said agreement and promise of the defendant, "agreed with the defendant" to fulfil these terms on his part, "and to be ready to start with the defendant on such travels on the day and year last aforesaid, at and for the wages and salary aforesaid." That, "from the time of the making of said agreement of the said promise of the defendant until the time when the defendant wrongfully refused to perform and broke his said promise, and absolved, exonerated, and discharged the plaintiff from the performance of his agreement as hereinafter mentioned, he, the plaintiff, was always ready and willing to enter into the service and employ of the defendant, in the capacity aforesaid, on the said 1st June, 1852, and to serve the defendant in that capacity, and to travel with him on the Continent of Europe as a courier for three months certain from the day and year last aforesaid, and to start with the defendant on such travels on the day and year last aforesaid, at and for the wages and salary aforesaid; and the plaintiff, but for the breach by the defendant of his said promise as hereinafter mentioned, would, on the said 1st June, 1852, have entered into the said service and employ of the defendant in the capacity, and upon the terms and for the time aforesaid; of all which several premises the defendant always had notice and knowledge, yet the defendant, not regarding the said agreement, nor his said promise, afterward and before the said 1st June, 1852, wrongfully wholly refused and declined to engage or employ the defendant in the capacity and for the purpose aforesaid, on or from the said 1st June, 1852, for three months, or on, from or for, any other time, or to start on such travels with the plaintiff on the day and year last aforesaid, or in any manner whatsoever to perform or fulfil his said promise, and then wrongfully wholly absolved, exonerated, and discharged the plaintiff from his said agreement, and from the performance of the same agreement on his, the plaintiff's, part, and from being ready and willing to perform the same on the plaintiff's part; and the defendant then wrongfully wholly broke, put an end to, and determined

his said promise and engagement ;" to the damage of the plaintiff. The writ was dated May 22d, 1852.

Pleas : 1. That defendant did not agree or promise in manner and form, etc., conclusion to the country. Issue thereon.

2. That plaintiff did not agree with defendant in manner and form, etc., conclusion to the country. Issue thereon.

3. That plaintiff was not ready and willing, nor did defendant absolve, exonerate, or discharge plaintiff from being ready and willing, in manner and form, etc., conclusion to the country. Issue thereon.

4. That defendant did not refuse or decline, nor wrongfully absolve, exonerate, or discharge, nor wrongfully break, put an end to or determine, in manner and form, etc., conclusion to the country. Issue thereon.

On the trial, before Erle, J., at the London sittings in last Easter Term, it appeared that plaintiff was a courier, who, in April, 1852, was engaged by defendant to accompany him on a tour to commence on June 1st, 1852, on the terms mentioned in the declaration. On May 11th, 1852, defendant wrote to plaintiff that he had changed his mind, and declined his services. He refused to make him any compensation. The action was commenced on May 22d. The plaintiff, between the commencement of the action and June 1st, obtained an engagement with Lord Ashburton, on equally good terms, but not commencing till July 4th. The defendant's counsel objected that there could be no breach of the contract before June 1st. The learned judge was of a contrary opinion, but reserved leave to enter a non-suit on this objection. The other questions were left to the jury, who found for plaintiff.

Hugh Hill, in the same term, obtained a rule *nisi* to enter a nonsuit or arrest the judgment. In last Trinity Term

Hannen showed cause.

Hugh Hill and *Deighton*, *contra*.

LORD CAMPBELL, C.J., now delivered the judgment of the Court.

On this motion in arrest of judgment, the question arises, Whether, if there be an agreement between A. and B., whereby B. engages to employ A. on and from a future day for a given period of time, to travel with him into a foreign country as a courier, and to start with him in that capacity on that day, A. being to receive a monthly salary during the continuance of such service, B. may, before the day, refuse to perform the agreement and break and renounce it, so as to entitle A. before the day to commence an action against B. to recover damages for breach of the agreement ; A. having been ready and willing to perform

it, till it was broken and renounced by B. The defendant's counsel very powerfully contended that, if the plaintiff was not contented to dissolve the contract and to abandon all remedy upon it, he was bound to remain ready and willing to perform it till the day when the actual employment as courier in the service of the defendant was to begin ; and that there could be no breach of the agreement before that day to give a right of action. But it cannot be laid down as a universal rule that, where by agreement an act is to be done on a future day, no action can be brought for a breach of the agreement till the day for doing the act has arrived. If a man promises to marry a woman on a future day, and before that day marries another woman, he is instantly liable to an action for breach of promise of marriage. Short *v.* Stone.[1] If a man contracts to execute a lease on and from a future day for a certain term, and before that day executes a lease to another for the same term, he may be immediately sued for breaking the contract. Ford *v.* Tiley.[2] So, if a man contracts to sell and deliver specific goods on a future day, and before the day he sells and delivers them to another, he is immediately liable to an action at the suit of the person with whom he first contracted to sell and deliver them. Bowdell *v.* Parsons.[3] One reason alleged in support of such an action is, that the defendant has, before the day, rendered it impossible for him to perform the contract at the day, but this does not necessarily follow ; for prior to the day fixed for doing the act, the first wife may have died, a surrender of the lease executed might be obtained, and the defendant might have repurchased the goods so as to be in a situation to sell and deliver them to the plaintiff. Another reason may be that, where there is a contract to do an act on a future day, there is a relation constituted between the parties in the meantime by the contract, and that they impliedly promise that in the meantime neither will do anything to the prejudice of the other inconsistent with that relation. As an example, a man and woman engaged to marry are affianced to one another during the period between the time of the engagement and the celebration of the marriage. In this very case of traveller and courier, from the day of the hiring till the day when the employment was to begin, they were engaged to each other ; and it seems to be a breach of an implied contract if either of them renounces the engagement. This reasoning seems in accordance with the unanimous decision of the Exchequer Chamber in Elderton *v.* Emmens,[4]

[1] 8 Q. B. 358. [2] 6 B. & C. 325. [3] 10 East, 359.
[4] 6 Com. B. 160. Affirmed in Dom. Proc.; Emmens *v.* Elderton, 4 H. L. Ca.

which we have followed in subsequent cases in this Court. The declaration in the present case, in alleging a breach, states a great deal more than a passing intention on the part of the defendant which he may repent of, and could only be proved by evidence that he had utterly renounced the contract, or done some act which rendered it impossible for him to perform it. If the plaintiff has no remedy for breach of the contract unless he treats the contract as in force, and acts upon it down to June 1st, 1852, it follows that, till then, he must enter into no employment which will interfere with his promise "to start with the defendant on such travels on the day and year," and that he must then be properly equipped in all respects as a courier for a three months' tour on the Continent of Europe. But it is surely much more rational, and more for the benefit of both parties, that, after the renunciation of the agreement by the defendant, the plaintiff should be at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damage he has suffered from the breach of it. Thus, instead of remaining idle and laying out money in preparations which must be useless, he is at liberty to seek service under another employer, which would go in mitigation of the damages to which he would otherwise be entitled for a breach of the contract. It seems strange that the defendant, after renouncing the contract, and absolutely declaring that he will never act under it, should be permitted to object that faith is given to his assertion, and that an opportunity is not left to him of changing his mind. If the plaintiff is barred of any remedy by entering into an engagement inconsistent with starting as a courier with the defendant on June 1st, he is prejudiced by putting faith in the defendant's assertion, and it would be more consonant with principle, if the defendant were precluded from saying that he had not broken the contract when he declared that he entirely renounced it. Suppose that the defendant, at the time of his renunciation, had embarked on a voyage for Australia, so as to render it physically impossible for him to employ the plaintiff as a courier on the Continent of Europe in the months of June, July, and August, 1852, according to decided cases, the action might have been brought before June 1st; but the renunciation may have been founded on other facts, to be given in evidence, which would equally have rendered the defendant's performance of the contract impossible. The man who wrongfully renounces a contract into which he has deliberately entered cannot justly complain if he is immediately sued for a compensation in damages by the man whom he has injured; and it seems reasonable to allow an option to

the injured party, either to sue immediately, or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrongdoer. An argument against the action before June 1st is urged from the difficulty of calculating the damages, but this argument is equally strong against an action before September 1st, when the three months would expire. In either case, the jury in assessing the damages would be justified in looking to all that had happened, or was likely to happen, to increase or mitigate the loss of the plaintiff down to the day of trial. We do not find any decision contrary to the view we are taking of this case. Leigh *v.* Patterson[1] only shows that, upon a sale of goods to be delivered at a certain time, if the vendor before the time gives information to the vendee that he cannot deliver them, having sold them, the vendee may calculate the damages according to the state of the market when they ought to have been delivered. If this was a sale of specific goods, the action, according to Bowdell *v.* Parsons,[2] might have been brought before that time, as soon as the vendor had sold and delivered them to another. Phillpotts *v.* Evans[3] was a similar case, and the only question there was as to the mode of calculating the damages on a breach of contract for the sale and delivery of wheat; the Court very properly holding that the plaintiff was entitled to damages according to the state of the market when the wheat was to be delivered; the Court professing to proceed upon the rule laid down in Startup *v.* Cortazzi,[4] where no question arose as to the right to bring an action before the stipulated day of delivery on a renunciation of the contract. Parke, B., whose dicta are entitled to very great weight, certainly does say in Phillpotts *v.* Evans,[5] with reference to the notice by the defendants that they would not accept the corn: "I think no action would then have lain for the breach of the contract, but that the plaintiffs were bound to wait until the time arrived for delivery of the wheat, to see whether the defendant would then receive it." But the learned judge might suppose that the notice did not amount to a renunciation of the contract; and, if he thought that, after such a renunciation, the plaintiffs were bound to proceed with the performance of the contract on their part, and to incur expense and loss in tendering the wheat before they could have any remedy on the contract, we cannot agree with him. In Ripley *v.* M'Clure[6] it is said that, under a contract for the sale and delivery of goods,

[1] 8 Taunt. 540.
[2] 10 East, 359.
[3] 5 M. & W. 475.
[4] 2 C. M. & R. 165.
[5] 5 M. & W. 477.
[6] 4 Exch. 345.

a refusal to receive them at any time before they ought to be delivered was not necessarily a breach of the contract, but the Court intimated no opinion upon the question whether, there being a contract to do an act at a future day, if one party before the day renounces the contract, the other thereupon has a remedy for a breach of the contract. And they held that a refusal by one party before the day when the act is to be done, if unretracted, would be evidence of a continual refusal down to, and inclusive of, the time when the act was to be done.

If it should be held that, upon a contract to do an act on a future day, a renunciation of the contract by one party dispenses with a condition to be performed in the meantime by the other, there seems no reason for requiring that other to wait till the day arrives before seeking his remedy by action, and the only ground on which the condition can be dispensed with seems to be, that the renunciation may be treated as a breach of the contract.

Upon the whole, we think that the declaration in this case is sufficient. It gives us great satisfaction to reflect that, the question being on the record, our opinion may be reviewed in a court of error. In the meantime we must give judgment for the plaintiff.

Judgment for plaintiff.[1]

FROST *v.* KNIGHT.

IN THE EXCHEQUER CHAMBER, FEBRUARY 8, 1872.

[*Reported in Law Reports, 7 Exchequer*, 111.]

ERROR on a judgment of the Court of Exchequer (Kelly, C.B., and Channell, B.; Martin, B., dissenting), arresting the judgment after a verdict for the plaintiff. The facts and pleadings in the case are stated in the judgment of the Lord Chief Justice, and more fully in the report of the case below.[2]

The case was argued by

Hill, Q.C. (*Dodd* with him), for the plaintiff.

Powell, Q.C. (*Streeten* with him), for the defendant.

The same arguments were used and cases cited as in the Court below.

Cur. adv. vult.[3]

[1] A portion of the opinion has been omitted.—ED.

[2] Law Rep. 5 Ex. 322.

[3] The case was heard before Cockburn, C.J., and Byles, Montague Smith, Keating, and Lush, JJ.; but before the judgment was delivered Montague Smith, J., had ceased to be a member of the Court.

The following judgments were delivered :

COCKBURN, C.J.[1] This case comes before us on error, brought on a judgment of the Court of Exchequer arresting the judgment in the action on a verdict given for the plaintiff.

The action was for breach of promise of marriage. The promise, as proved, was to marry the plaintiff on the death of the defendant's father. The father still living, the defendant announced his intention of not fulfilling his promise on his father's death, and broke off the engagement, whereupon the plaintiff, without waiting for the father's death, at once brought the present action. The plaintiff having obtained a verdict, a rule *nisi* was applied for to arrest the judgment, on the ground that a breach of the contract could only arise on the father's death, till which event, no claim for performance could be made, and, consequently, till its occurrence, no action for breach of the contract be maintained. A rule *nisi* having been granted, a majority of the Court of Exchequer concurred in making it absolute, Martin, B., dissenting ; and the question for us is, whether the judgment of the majority was right.

The cases of Lovelock *v.* Franklyn[2] and Short *v.* Stone,[3] which latter case was an action for breach of promise of marriage, had established that where a party bound to the performance of a contract at a future time puts it out of his own power to fulfil it, an action will at once lie. The case of Hochster *v.* De la Tour,[4] upheld in this Court in the Danube & Black Sea Co. *v.* Xenos[5] went further, and established that notice of an intended breach of a contract to be performed *in futuro* had a like effect.

The law with reference to a contract to be performed at a future time, where the party bound to performance announces prior to the time his intention not to perform it, as established by the cases of Hochster *v.* De la Tour[6] and the Danube & Black Sea Co. *v.* Xenos[7] on the one hand, and Avery *v.* Bowden,[8] Reid *v.* Hoskins,[9] and Barwick *v.* Buba[10] on the other, may be thus stated. The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance ; but in that case he keeps the contract alive for the benefit of the other

[1] In this judgment Keating and Lush, JJ., concurred.

[2] 8 Q. B. 371.

[3] *Ibid.* 358.

[4] 2 E. & B. 678 ; 22 L. J. (Q. B.) 455.

[5] 13 C. B. (N. S.) 825 ; 31 L. J. (C. P.) 284.

[6] 2 E. & B. 678 ; 22 L. J. (Q. B.) 455.

[7] 13 C. B. (N. S.) 825 ; 31 L. J. (C P.) 284.

[8] 5 E. & B. 714 ; 26 L. J. (Q. B.) 3.

[9] 6 E. & B 953 ; 26 L. J. (Q. B.) 5.

[10] 2 C. B. (N. S.) 563 ; 26 L. J. (C. P.) 280.

party as well as his own ; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it.

On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it ; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss.

Considering this to be now settled law, notwithstanding anything that may have been held or said in the cases of Phillpotts *v.* Evans[1] and Ripley *v.* McClure,[2] we should have had no difficulty in applying the principle of the decision in Hochster *v.* De la Tour[3] to the present case, were it not for the difference which undoubtedly exists between that case and the present—namely, that, whereas there the performance of the contract was to take place at a fixed time, here no time is fixed, but the performance is made to depend on a contingency—namely, the death of the defendant's father during the lifetime of the contracting parties. It is true that in every case of a personal obligation to be fulfilled at a future time, there is involved the possible contingency of the death of the party binding himself, before the time of performance arrives ; but here we have a further contingency depending on the life of a third person, during which neither party can claim performance of the promise. This being so, we thought it right to take time to consider whether an action would lie before the death of the defendant's father had placed the plaintiff in a position to claim the fulfilment of the defendant's promise.

After full consideration we are of opinion that, notwithstanding the distinguishing circumstance to which I have referred, this case falls within the principle of Hochster *v.* De la Tour,[4] and that, consequently, the present action is well brought.

The considerations on which the decision in Hochster *v.* De la Tour[5] is founded are that the announcement of the contracting party of his intention not to fulfil the contract amounts to a breach, and that it is for the common benefit of both parties

[1] 5 M. & W. 475.
[2] 4 Ex at p. 359.
[3] 2 E. & B. 678 ; 22 L. J. (Q. B.) 455
[4] *Ibid.*
[5] *Ibid.*

that the contract shall be taken to be broken as to all its incidents, including non-performance at the appointed time ; as by an action being brought at once, and the damages consequent on non-performance being assessed at the earliest moment, many of the injurious effects of such non-performance may possibly be averted or mitigated.

It is true, as is pointed out by the Lord Chief Baron, in his judgment in this case, that there can be no actual breach of a contract by reason of non-performance so long as the time for performance has not yet arrived. But, on the other hand, there is—and the decision in Hochster *v.* De la Tour[1] proceeds on that assumption—a breach of the contract when the promisor repudiates it and declares he will no longer be bound by it. The promisee has an inchoate right to the performance of the bargain, which becomes complete when the time for performance has arrived. In the meantime he has a right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficacy may be essential to his interests. His rights acquired under it may be dealt with by him in various ways for his benefit and advantage. Of all such advantage the repudiation of the contract by the other party, and the announcement that it never will be fulfilled, must of course deprive him. It is therefore quite right to hold that such an announcement amounts to a violation of the contract *in omnibus*, and that upon it the promisee, if so minded, may at once treat it as a breach of the entire contract, and bring his action accordingly.

The contract having been thus broken by the promisor, and treated as broken by the promisee, performance at the appointed time becomes excluded, and the breach by reason of the future non-performance becomes virtually involved in the action as one of the consequences of the repudiation of the contract ; and the eventual non-performance may therefore, by anticipation, be treated as a cause of action, and damages be assessed and recovered in respect of it, though the time for performance may yet be remote.

It is obvious that such a course must lead to the convenience of both parties ; and though we should be unwilling to found our opinion on grounds of convenience alone, yet the latter tend strongly to support the view that such an action ought to be admitted and upheld. By acting on such a notice of the intention of the promisor, and taking timely measures, the promisee may in many cases avert, or at all events materially lessen, the injurious effects which would otherwise flow from the non-ful-

[1] 2 E. & B. 678 ; 22 L. J. (Q. B.) 455.

filment of the contract; and in assessing the damages for breach of performance, a jury will of course take into account whatever the plaintiff has done, or has had the means of doing, and, as a prudent man, ought in reason to have done, whereby his loss has been, or would have been, diminished.

It appears to us that the foregoing considerations apply to the case of a contract the performance of which is made to depend on a contingency, as much as to one in which the performance is to take place at a future time; and we are, therefore, of opinion that the principle of the decision of Hochster *v.* De la Tour[1] is equally applicable to such a case as the present.

It is next to be observed, that the law as settled by Hochster *v.* De la Tour[2] and Danube & Black Sea Co. *v.* Xenos[3] is obviously quite as applicable to a contract in which personal status or personal rights are involved, as to one relating to commercial or pecuniary interests. Indeed, the contract of marriage appears to afford a striking illustration of the expediency of holding that an action may be maintained on the repudiation of a contract to be performed *in futuro*. On such a contract being entered into, not only does a right to its completion arise with reference to domestic relations and possibly pecuniary advantages, as also to the social status accruing on marriage, but a new status, that of betrothment, at once arises between the parties. This relation, it is true, has not, by the law of England, the same important consequences which attached to it by the canon law and the law of many other countries. Nevertheless, it carries with it consequences of the utmost importance to the parties. Each becomes bound to the other; neither can, consistently with such a relation, enter into a similar engagement with another person; each has an implied right to have this relation continued till the contract is finally accomplished by marriage. To the woman, more especially, it is all-important that the relation shall not be put an end to. Independently of the mental pain occasioned by the abrupt termination of such an engagement, the fact of its existence, if followed by such a termination, must necessarily operate to her serious disadvantage. During its continuance others will naturally be deterred from approaching her with matrimonial intentions; nor could she admit of such approaches, if made; while the breaking off of the engagement is too apt to cast a slur upon one who has been thus treated. We see, therefore, every reason for applying the principle of Hochster *v.* De la Tour[4] to such a case, and for holding the contract, if repudiated, to be broken,

[1] 2 E. & B. 678; 22 L. J. (Q. B.) 455.
[2] *Ibid.*
[3] 13 C. B. (N. S.) 825; 31 L. J. (C. P.) 284.
[4] 2 E. & B. 678; 22 L. J. (Q. B.) 455.

not only in its present, but also in its ultimate obligations and consequences. To hold that the aggrieved party must wait till the time fixed for marrying shall have arrived, or the event on which it is to depend shall have happened, would have the effect of aggravating the injury, by preventing the party from forming any other union, and by reason of advancing age rendering the probability of such a union constantly less. It has been suggested, indeed, that the desire of marrying and the happiness to be expected from it diminish with advancing years, and, therefore, that when by the terms of the contract marriage is only to take place at a remote time, the value of the marriage and the damages to be recovered for a breach of the promise would be less if the refusal were made when the time for marrying was accomplished ; and that, consequently, an action ought not to be allowed till the time when the fulfilment of the contract could have been claimed. We cannot concur in this view. We think that, in estimating the amount of injury done and of the compensation to be made for it, if the contract were broken when the time for marrying had arrived, the wasted years and the impossibility of forming any other engagement during the intermediate time should be taken into account, and not merely the age of the parties and the then existing value of the marriage. It is, therefore, manifest that it is better for both parties —for the party intending to break the contract, as well as for the party wronged by the breach of it—that an express repudiation of the contract should be treated as a violation of it in all its incidents, and should give the right to the party wronged to bring an action at once, and have the damages assessed at the earliest moment. No one can doubt that, morally speaking, a party who determines to break off a matrimonial engagement acts far more commendably if he at once gives notice of his intention, than if he keeps that intention secret till the time for fulfilling the promise has come. The reason is that the giving such notice at the earliest moment tends to mitigate, while the delay in giving it necessarily aggravates, the injury of the party wronged.

It has been urged that there must be great difficulty in thus assessing damages prospectively. But this must always be more or less the case whenever the principle of Hochster *v.* De la Tour[1] comes to be applied. It would equally exist where one of the parties, by marrying another person, gave rise, as in the case of Short *v.* Stone,[2] to an immediate right of action. It cannot be said that the difficulty is by any means insuperable, and the advantages resulting from the application of the prin-

[1] 2 E. & B. 678 ; 22 L. J. (Q. B.) 455. [2] 8 Q. B. 358.

ciple of Hochster *v.* De la Tour[1] are quite sufficient to outweigh any inconvenience arising from the difficulty of assessing the damages.

We are struck by the fact that the Lord Chief Baron, while holding that the present action would not lie, expressed an opinion that the wrong done by the repudiation of a contract of marriage might be made the foundation of an action on the case, in which the facts should be set forth. But as the rights and obligations of the parties arise here entirely out of the contract, we have a difficulty in seeing how such an action could be maintained. But be that as it may, as in such an action as is thus suggested the damages would have to be ascertained with reference to the same facts and the same considerations as in an action brought on the contract, it seems to us by far the simpler course, the case being, as it seems to us for the reasons we have given, clearly within the decision in Hochster *v.* De la Tour,[2] to hold that the present action for breach of the contract may be maintained, and that in it the plaintiff is entitled to recover damages in respect of the non-fulfilment of the promise as though the death of the defendant's father—the event on which the fulfilment was to depend—had actually occurred.

We are therefore of opinion that the judgment of the Court of Exchequer must be reversed.

Judgment reversed.[3]

THOMAS J. DANIELS *v.* SAMUEL F. J. NEWTON AND ANOTHER.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, JANUARY TERM, 1874.

[*Reported in* 114 *Massachusetts Reports* 530.]

WELLS, J. This action is for breach of an agreement in writing, under seal, for the purchase of certain land from the plaintiff by the defendants. The time for performance is indicated by two clauses; one that "said premises are to be conveyed within thirty days from this date;" the other that "in case the said parties of the second part should fail to sell their estate at the expiration of the thirty days, then we agree to extend this agreement for thirty days." The inference from the latter clause is that the defendants were to have the whole thirty days for performance on their part, and, in the contingency men-

[1] 2 E. & B. 678; 22 L. J. (Q. B.) 455.

[2] *Ibid.*

[3] The concurring opinion of Byles, J., has been omitted.—ED.

tioned, thirty days more. Such was the effect given to the terms of the written instrument, by the ruling at the trial, and we think correctly.

The plaintiff relied upon a supposed breach of the agreement by the defendants within the thirty days ; to wit, May 29th, the writing being dated May 15th, and thereupon had brought his action May 30th. The ruling of the Court upon this point was that if the defendants " fixed a day, within said thirty days, for the performance of said agreement by the respective parties, and the plaintiff was then ready to perform his part, and the defendants then refused absolutely to perform said agreement on their part, then or at any other time, that would be a breach of the agreement on their part for which the plaintiff can maintain this action."

We do not understand this ruling to have been based upon the supposition of an oral agreement in regard to the time of performance varying the terms of the written instrument as an executory contract. It would have been clearly erroneous in that aspect ; first, because no such substituted agreement is set forth in the declaration ; secondly, because such an oral agreement in regard to land would be within the Statute of Frauds, and could not be so enforced.

Subsequent oral agreements in regard to the mode and time of performance of written contracts relating to land, are doubtless admissible to affect the question whether the conduct of either party, as proved, constitutes a breach of his written agreement. In that aspect, the evidence adduced by the plaintiff in this case was competent, and might have warranted the jury in finding a breach of the contract by the defendants, if they did not revoke their refusal within the thirty days, even without any further offer to perform on the part of the plaintiff.

The action having been brought immediately upon the refusal, and within the time allowed for performance by the terms of the written contract sued upon, the effect of the ruling was that an absolute refusal of performance, purporting and intended to be a refusal to fulfil the contract at any time, would be of itself a breach of a contract, for acts to be done within a time not yet expired, so that an action would lie forthwith. The proposition involved in this ruling, to wit, that there may be a breach of contract, giving a present right of action, before the performance is due by its terms, seems to have been adopted by recent English decisions. Frost *v.* Knight, L. R. 7 Ex. 111 (1872) ; Hochster *v.* De la Tour, 2 E. & B. 678 (1853).

It is said to be applicable, not only in cases where performance has been rendered impossible by the voluntary conduct of

the party, as in agreements for marriage or conveyance of land, by marriage or conveyance to another, and by way of exception to the general rule formerly maintained, but to the full extent of a general rule ; so that an absolute and unqualified declaration of a purpose not to fulfil or be held by the contract, made by one party to the other, may be treated as of itself a present breach of the contract by repudiation, as well before as after the time stipulated for its fulfilment by such party. The point was elaborately discussed in Frost *v.* Knight, by Lord Cockburn, C.J., and the principle evolved is expressed in these propositions on page 114 :

" The promisee has an inchoate right to the performance of the bargain, which becomes complete when the time for performance has arrived. In the meantime he has a right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficacy may be essential to his interests. His rights acquired under it may be dealt with by him in various ways for his benefit and advantage."

" The contract having been thus broken by the promisor and treated as broken by the promisee, performance at the appointed time becomes excluded, and the breach by reason of the future non-performance becomes virtually involved in the action as one of the consequences of the repudiation of the contract ; and the eventual non-performance may therefore, by anticipation, be treated as a cause of action, and damages be assessed and recovered in respect of it, though the time for performance may yet be remote."

The first of these two propositions would apply with peculiar force to commercial paper, especially if its repudiation by the maker were made public. We see no reason for a distinction which should exclude it from the same rule that applies to other promises in writing, in respect to what will constitute a breach of the principal contract between the maker and payee. We are not aware, however, that any decision has carried out the rule by applying it to such contracts, and we doubt if the learned jurists who propounded it would have been willing to follow it to that extent.

The doctrine has never been adopted in this Commonwealth, nor has it received any recognition, so far as we are able to learn, beyond that in Heard *v.* Bowers, 23 Pick. 455, 460. The Court in that case refer to Ford *v.* Tiley, 6 B. & C. 325, 327, and 5 Vin. Ab. 224 ; the doctrine announced in Ford *v.* Tiley being, as it appears to us, an erroneous application of the maxims contained in Viner.

A renunciation of the agreement, by declarations or incon-

sistent conduct, before the time of performance, may give cause for treating it as rescinded, and excuse the other party from making ready for performance on his part, or relieve him from the necessity of offering performance in order to enforce his rights. It may destroy all capacity of the party, so disavowing its obligations, to assert rights under it afterward, if the other party has acted upon such disavowal. But we are unable to see how it can, of itself, constitute a present violation of any legal rights of the other party, or confer upon him a present right of action. An executory contract ordinarily confers no title or interest in the subject-matter of the agreement. Until the time arrives when, by the terms of the agreement, he is or might be entitled to its performance, he can suffer no injury or deprivation which can form a ground of damages. There is neither violation of right, nor loss upon which to found an action. The true rule seems to us to be that in order to charge one in damages for breach of an executory personal contract, the other party must show a refusal or neglect to perform, at a time when and under conditions such that he is or might be entitled to require performance. Frazier *v.* Cushman, 12 Mass. 277 ; Pomroy *v.* Gold, 2 Met. 500 ; Hapgood *v.* Shaw, 105 Mass. 276 ; Carpenter *v.* Holcomb, 105 Mass. 280. Such undoubtedly was the interpretation of the common law in all the earlier decisions. Phillpotts *v.* Evans, 5 M. & W. 475 ; Ripley *v.* M'Clure, 4 Exch. 345 ; Lovelock *v.* Franklyn, 8 Q. B. 371.

The case of Ford *v.* Tiley, 6 B. & C. 325, cited in Heard *v.* Bowers, was an action on an agreement of the defendant that he would, as soon as he should become possessed of a certain public house, execute a lease thereof to the plaintiff for a term of years from December 21st, 1825. There was, in fact, an outstanding lease of the premises to another, to expire at midsummer, in 1827. Before that term expired, the defendant joined with the trustees, who held the legal title, in a lease to another party for twenty-three years. It was held to be a breach of his agreement with the plaintiff, for which an action would lie at once, because the defendant had given up his right to have the possession, and put it out of his power, so long as his own lease for twenty-three years should last. It does not appear that the suit was brought before December 21st, 1825 ; nor that the time when the defendant would become possessed was mentioned in the agreement. It was not the case of an agreement to make a lease at a named future day. The outstanding lease was an extrinsic fact, merely affecting the occurrence of the contingency upon which the performance of the agreement depended ; it had no other force in the contract.

When, therefore, the defendant made a lease to a stranger, he could no longer say that he was prevented from becoming possessed by the outstanding previous lease, because he had put it out of his power to come into possession, if that were surrendered or otherwise terminated. The plaintiffs' right to have a lease presently was subject only to a contingency, of which the defendant had no longer the ability to avail himself. The judgment accords with the rule we have indicated. But in giving judgment, Bayley, J., citing 1 Rol. Ab. 248 ; 5 Vin. Ab. 225 ; 21 Ed. IV. 55, and Co. Litt. 221*b*, proceeds to say : " Now if the feoffment of a stranger before the day be a breach of a condition to enfeoff J. S. at a given day, the granting of a lease to a stranger before the day will be a breach of a contract to grant a lease to J. S. at a given day, and *a fortiori* will it be a breach so long as the lease to such stranger remains in force."

It seems to us, however, that the reasoning from conditions of forfeiture or defeasance to executory contracts is illogical. If one, having an estate on condition, by his own act in dealing with the estate, puts it out of his power to perform or comply with the condition, he does what is inconsistent with the terms upon which alone he has the estate ; and his grantor may re-enter, even before the time of stipulated performance, not because of a new right acquired by the terms of the agreement, but because the right of the other party having become forfeited or extinguished by his breach of the condition, or violation of the terms of his tenancy, the grantor or feoffer is restored to his former estate and right. It is by virtue of that right or title that he enters, the other party being no longer able to avail himself of his conditional estate or right. The analogy holds good if the plaintiff's right to require performance of the agreement awaits only a contingency which the defendant removes by making it impossible, which was the real case in Ford *v.* Tiley. It gives no support to the very different proposition that, in a contract to be performed on a given day, the voluntary disability of one party will entitle the other to require performance, or to have an action for non-performance, before that day arrives.

The distinction is recognized by the authorities referred to by Bayley, J. Lord Coke says : " And herein a diversity is to be observed between a disability for a time on the part of the feoffee, and a disability for a time of the part of the feoffor." In the one case, albeit " a certain day be limited, yet the feoffee being once disabled is ever disabled." " And the reason of the diversity is, for that, as Littleton saith, *maintenant* by the disability of the feoffee, the condition is broken, and the feoffor

may enter, but so it is not by the disability of the feoffor, or his heirs ; for if they perform the condition within the time, it is sufficient, for that they may at any time perform the condition before the day." Co. Litt. 221*b* ; 5 Vin. Ab. 224, Condition, B. c.[1]

Throughout the whole discussion, both in Hochster *v.* De la Tour and Frost *v.* Knight, the question as to what conduct of the defendant will relieve the plaintiff from the necessity of showing readiness and an offer to perform at the day, in order to make out a breach by the other, appears to us to be confounded with that of the plaintiff's cause of action ; or rather, the question, in what consists the plaintiff's cause of action, is lost sight of ; the Court dealing only with the conduct of the defendant in repudiating the obligations of his contract.

Much argument is expended in both cases upon the ground of convenience and mutual advantage to the parties from the rule sought to be established. But before that argument can properly have weight, the point to be reached must first be shown to be consistent with logical deductions from the strictly legal aspects of the case. The legal remedy must be founded on some present legal right, and must conform to the nature of that right. Until the plaintiff has either suffered loss or wrong in respect of that which has already vested in him in right, or has been deprived of or prevented from acquiring that which he is entitled to have or demand, he has no ground on which to seek a remedy by way of reparation. The conduct of the defendant is no wrong to the plaintiff until it actually invades some right of his. Actual injury and not anticipated injury is the ground of legal recovery. The plaintiff's rights are invaded by repudiation of the contract only when it produces the effect of non-performance, or prevents him from entering upon or completing performance on his part, at a time when and in the manner in which he is entitled to perform it or to have it performed.

That this is the natural and ordinary rule seems to be recognized by Lord Campbell, when he declares that " it cannot be laid down as a universal rule," and proceeds to point out exceptions. And Lord Cockburn, C.J., concedes it to be true " that there can be no actual breach of a contract by reason of non-performance, so long as the time for performance has not yet arrived." L. R. 7 Ex. 114. But preceding " inchoate right" is discovered, and a corresponding obligation implied, upon which there may be held to be " a breach of the contract when the promisor repudiates it and declares he will no longer be bound by it."

[1] A portion of the opinion has been omitted.—ED.

In Hochster *v.* De la Tour, Lord Campbell assigns, as one reason for the decision, that in case of employment as courier, and of promise to marry, a relation is established between the parties by the contract, even before the time of performance ; "they impliedly promise that in the mean time neither will do anything to the prejudice of the other inconsistent with that relation ;" and "it seems to be a breach of an implied contract if either of them renounces the engagement." In Frost *v.* Knight, the Lord Chief Justice remarks of the promise to marry : "On such a contract being entered into, not only does a right to its completion arise with reference to domestic relations and possibly pecuniary advantages, as also to the social status accruing on marriage, but a new status, that of betrothment, at once arises between the parties." "Each becomes bound to the other ; neither can, consistently with such a relation, enter into a similar engagement with another person ; each has an implied right to have this relation continued till the contract is finally accomplished by marriage."

These, however, are considerations which touch the interpretation and effect of the particular kind of contract ; and so far as they tend to sustain the decisions upon the ground of implied obligations arising and requiring observance at once upon entering into the relation by means of such a contract, they also tend to remove the decisions themselves out of the range of the question we are now discussing. If there be sound reason to deduce from a promise to marry, or to employ in a special capacity, at a future time, present obligations of implied contract, upon which an action may be founded, in which the breach of the entire agreement "by reason of the future non-performance" will be "virtually involved," "as one of the consequences of the repudiation of the contract," it surely is not sound reasoning by means of that process to arrive at the conclusion that all contracts, having a future day for their performance, include like rights and obligations, so as to enable one party to sue at once, as for a breach, whenever the other announces beforehand his purpose of future non-fulfilment. If this is the result, as it appears to be, of the English decisions referred to, or of the reasoning in those cases, we cannot accede to it. We have no occasion now to determine what may be the rule, where the contract may fairly be interpreted as establishing between the parties a present relation of mutual obligations, because we are of opinion that no such implied obligations can be engrafted upon the contract in the present case. It simply binds the defendants to receive a deed of real estate and pay or secure the purchase-money ; and its written provisions, by

which alone their obligations are to be ascertained, allow them thirty days at least within which to fulfil their agreement. The plaintiff could require nothing of them until the expiration of that time ; and no conduct on their part or declaration, whether of promise or denial, could give him any cause of action in respect of that agreement of sale. This action therefore cannot be maintained.

Exceptions sustained.

L. S. Dabney for the defendant.

W. Colburn for the plaintiff.

EDWARD S. STOKES, Respondent, *v.* JOHN W. MACKAY and HECTOR DE CASTRO, Appellants.

In the Court of Appeals of New York, October 8, 1895.

[*Reported in* 147 *New York Reports* 223.]

Appeal from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made December 14th, 1894, which affirmed a judgment in favor of plaintiff entered upon a verdict of a jury, and also affirmed an order denying defendants' motion for a new trial.

This action was brought to recover the sum of $100,000, less a payment thereon of $25,000, with interest from February 26th, 1889.

The plaintiff alleged in his complaint that prior to December 26th, 1888, he owned and possessed certain bonds and stocks of telegraph companies, for convenience called telegraph properties, and at that time an agreement was entered into between him and the defendants whereby they agreed to purchase the telegraph properties and pay therefor the sum of $100,000 upon the assignment and delivery of such properties to them by him ; that he thereafter assigned and transferred the properties to the defendants and performed the agreement on his part ; that thereafter, on or about February 25th, 1889, they paid him the sum of $25,000 as a partial payment, and that the balance, $75,000, remained due to him, and he prayed judgment for that sum with interest.

The defendants answered separately, denying the allegations of the complaint and making certain affirmative allegations against the plaintiff's right to recover.

The first trial of the action resulted in a judgment in favor

of the plaintiff upon a verdict directed by the Court, which judgment was reversed by this Court and a new trial granted on the ground that certain questions of fact should have been submitted to the jury. (See 140 N. Y. 640.)

Upon the second trial, now under review, all such questions were decided in favor of plaintiff.

The facts will be found fully stated in the prevailing opinion on the former appeal and in the opinion herein.

Joseph Larocque for the appellants.

Esek Cowen and *Joseph H. Choate* for the respondent.

GRAY, J. When this case was reviewed by us upon the prior appeal (140 N. Y. 640), it was decided that there were certain questions of fact, upon the evidence, which should have been submitted to the jury and, because the trial judge had refused to do so and had directed a verdict for the plaintiff, the judgment recovered was reversed and a new trial was ordered. There was a sharp difference in opinion as to the effect of the evidence. It was thought by some of the members of the Court that the proof was such as to establish a complete adoption by Mackay of the contract, which De Castro, as his representative or agent, had made for him with Stokes, and which provided for the sale and transfer by the latter to Mackay of the bonds and stocks of the United Lines Telegraph Company held by him, or to which he might be entitled, in consideration of the payment of $100,000 and the cancellation of an existing indebtedness. A general outline of the facts may be briefly given. The telegraph interests and properties had been acquired and created by Stokes as the result of a joint venture with Mackay, undertaken in 1884, with moneys furnished by the latter. It had commenced with the acquisition by Stokes of the Bankers' & Merchants' Telegraph Company's properties and franchises, at a receiver's sale thereof. He reorganized the same into the United Lines Telegraph Company ; became its president ; received $2,380,000 of the $3,000,000 of capital stock, and held, or controlled, the $1,200,000 of first mortgage bonds and added to the company's property by building or purchasing additional telegraph lines. It was the purpose, eventually, when the scheme was ripe, to consolidate this company with the Postal Telegraph Company, of which Mackay was, practically, the owner and for the benefit of which the other properties had been acquired and developed. Either in the securities of the new company to be so formed, or in the profits of the joint enterprise (it was a question which) Stokes had an interest.

Meanwhile everything stood in Stokes's name and was in his possession and control. After about four years Mackay desired

to obtain these telegraph bonds and stocks, and instructed his agent, De Castro, to procure their transfer by Stokes. Stokes was not unwilling to turn them over, but insisted upon some agreement being made which should recognize and provide for his interest in the telegraph properties or in the profits of the enterprise. The contract in question was then made and signed by Stokes and De Castro on December 24th, 1888; Stokes delivering to Ingersoll, as a condition of De Castro's signature, a large number of the bonds of the United Lines Company, to be held until Mackay was heard from, in approval, or otherwise, of what his agent had done. The day when the contract was so made De Castro sent a telegram to Mackay, stating that Stokes had "turned over to Ingersoll $935,000 of bonds and other securities," and had "signed also an agreement which is forwarded and which leaves him out," and that "Ingersoll will turn over to E. C. Platt these securities for custody; this the only way it could be done, and I hope it will be satisfactory." Platt, the representative of the Nevada Bank and the financial agent of Mackay here also, on the same day telegraphed to him about Stokes having deposited the bonds with Ingersoll, and that "$1,600,000 stock will be assigned and all judgments turned over on your order as soon as agreement forwarded to-day is signed by you." Makcay did not wait to see the contract, but immediately telegraphed to De Castro: "All right and satisfactory. I want you to tell Ingersoll to do nothing in this case except what he knows to be correct and legal, as I do not want trouble for what has been done in the past nor in the future." And to Platt he also at once telegraphed: "All right. You take whatever securities Ingersoll gives you, as Ingersoll understands this matter fully." Stokes had not been shown the telegram sent by De Castro on December 24th, but was only told by him that he had telegraphed Mackay about the arrangement. On December 26th, upon De Castro's informing him of Mackay's telegram that it was "all right and satisfactory," Stokes went to the company's office and made a transfer in blank of the 23,800 shares of stock which he held and delivered the same to Townsend for Mackay. The same day De Castro receipted upon the contract as for the bonds previously delivered to and held by Ingersoll. The latter then wrote Mackay a letter on December 26th, informing him of the delivery by Stokes of the bonds and the stock, and enclosing the contract. To this letter Mackay answered, to the effect that "on looking over the agreement he saw no necessity for signing it. Some portions of it are wrong;" that the claim against Read & Co. (Stokes's firm) "had nothing whatever to do with the telegraph business,"

and that "there is no necessity to make any change at present except to place the securities with Mr. Platt for safe-keeping." Subsequently there were two significant occurrences. In the first place, the certificate for the 23,800 shares of stock was filled up with Mackay's name, thus making the transfer of the stock absolute. Then a loan of $25,000, secured by Stokes from a bank upon the collateral security of $100,000 of the United Lines bonds, was paid off by money obtained from Mackay, and the bonds were taken up and delivered to Platt for Mackay. With this sum of $25,000 Stokes has credited Mackay, as in part payment of the $100,000 mentioned in the contract. In March, 1889, Mackay arrived in New York from California, and had interviews with Stokes, in which he refused to recognize or to be bound by the contract of December and repudiated the transaction, demanding that plaintiff account to him with respect to their past financial transactions. But instead of restoring the securities, which Stokes had turned over upon the faith of the contract of December, he insisted upon his right to them, and that Ingersoll should deliver to him what he held. Mackay claimed that an arrangement was made by which Stokes agreed that the securities might be turned over, that he would account to him as to their past financial transactions, and that he would rely upon Mackay's generosity as to any compensation for his interest in the telegraph properties. That was the position taken by Mackay, while it was claimed by Stokes that a contract had been entered into by Mackay in December, which was binding upon the latter, and which had been mostly executed on his part by a delivery of the bonds and of the controlling interest in the capital stock. In brief, Stokes occupied the position of Mackay's having become obligated to him under the December contract, either by reason of the telegrams sent in response to the communications of his agents in relation to the arrangement with Stokes, or by force of his subsequent conduct in adoption of that arrangement, by the retention and ultimate acceptance of its benefits. The proof is that Stokes had turned over practically all of the great property in his possession, and that Mackay had received it, and the verdict establishes that it was in pursuance of the agreement between them, which obligated the latter to pay a certain consideration and cancelled the existing indebtedness referred to.

The evidence upon the last trial does not essentially differ from that given upon the first trial, and the jury have now decided in plaintiff's favor all the questions of fact which were deemed, in the prevailing opinion rendered in this Court, to arise upon the evidence. They were, in substance, whether

the meaning of Mackay's telegram was that he would be bound by the December contract ; whether he had ratified and adopted it ; whether Stokes had agreed to abandon it and to rely solely upon Mackay's generosity for his compensation. It was said in the former opinion : " The ultimate issue to be determined is whether Mackay became bound as a party to the agreement signed by Stokes and De Castro by ratification, adoption, or estoppel, and all the evidence bearing upon that issue should be fairly submitted to the jury for their determination." In view of the opinion of this Court, and of the decisive character of the verdict of the jury, in settling the questions upon which the parties were in conflict, the controversy should be considered as having ended with the result of the trial, and the error must be both serious and plain, which should influence us to reverse the judgment, which the plaintiff has again recovered, and to direct a further trial of the issues.

The appellants insist that several errors were committed in rulings made by the learned trial judge upon questions of evidence and in his instructions to the jury. We think it only necessary to refer to the contention that the plaintiff failed to make any tender of certain of the United Lines Company's bonds prior to the commencement of his action, and that he did not show that he was able actually to deliver them to Mackay had the latter been willing to accept a delivery. These propositions have reference to the fact that Stokes had pledged some of the bonds to secure loans of moneys, and the argument is, assuming that the evidence justified the jury in believing their tender to have been waived nevertheless, that it was incumbent upon Stokes affirmatively to establish the fact that he was in a position to redeem the bonds and able actually to deliver them to Mackay, upon the latter's paying the balance of $75,000 claimed by Stokes as due upon the contract. This phase of the contention between the parties is claimed to have been made to appear by the motions of the defendants to dismiss the complaint and to direct a verdict. The motion to dismiss was made upon the general ground that the plaintiff had failed to establish his alleged cause of action, and it did not specify, or call to the attention of the Court that or any other particular point. It was, therefore, an insufficient basis upon which to predicate error with respect to some feature of the trial not necessarily suggested by the language used. The motion to direct a verdict was based upon three grounds, two only of which have relation to the present point. They were that there had been no delivery and no tender, and no sufficient evidence of a waiver of a tender of the $115,000 of United Lines Telegraph bonds,

which were shown to have been pledged with the Chemical Bank ; that those bonds, as appeared by the evidence, had to a considerable amount been subjected by the plaintiff to further and different liabilities and by the plaintiff's voluntary act passed from his control.

" Third. Upon the ground that there had been no delivery and no tender and no excuse for non-delivery of the bonds which had been, according to the testimony in the Madison Square Bank. On the contrary, it appeared from the evidence that after the time it is alleged that the contract sued upon was made, the plaintiff himself was borrowing money and creating a burden upon these bonds for the payment of his own obligations, and that if any tender had been in point of fact made or proposed, the same had not been kept good as required by law."

While the effect of the motion was to raise the question of tender and of the sufficiency of the evidence to justify a finding that a tender had been waived, it does not suggest the point that the plaintiff was unable to perform by a delivery, at the time when tender was offered to be made and when the same was waived. The fact that the bonds were pledged to secure liabilities of the plaintiff was in no wise inconsistent with plaintiff's ability to redeem or to procure them for delivery to the defendants. If the defendants believed, and intended to make the point, that the plaintiff was actually incapable of delivering the small balance remaining of the bonds, it should have been distinctly stated. The plaintiff having given evidence of his willingness to turn over the remaining bonds, if defendants would pay the $75,000 due by the contract, and that their formal tender was waived, he had, *prima facie*, established the breach by the defendants of the contract relied upon and that it was owing, not to some default on his part, but to Mackay's refusal to be bound by the terms of the contract, or to recognize that any rights had accrued to the plaintiff by reason of the transactions between them. Manifestly, in that attitude of the parties, the plaintiff was not called upon to establish the fact that had the defendants not waived a tender and a tender had been necessary, he possessed ways and means to produce and present the bonds for acceptance or refusal. Whatever was the real condition of his finances, there was nothing to warrant the inference of an inability to redeem the bonds, and if presumptions were to be indulged in, the presumption of plaintiff's ability to perform his agreement and to have the means to do so obtained, until overcome by evidence to the contrary. It is very clear, under the circumstances disclosed, if at all essential, that it was incumbent upon the defendants to make out the fact, which

they wholly failed to establish, that the plaintiff was incapable of redeeming the bonds for delivery. It is equally clear that they did not entertain a notion which was not suggested upon the trial either by motion or by a request for an instruction to the jury, or in any other manner.

The only point suggested by the motion to direct a verdict was that there had been no tender of the bonds, and that defendants had not waived a tender, and, as bearing upon the efficacy of the tender to relieve the plaintiff of the duty resting upon him, it was stated that the bonds were pledged to secure liabilities of the plaintiff, and had thus passed from his control. The defendants claim that there were $165,000, par value, of those bonds, which, at the time of the commencement of the action had not been delivered by the plaintiff. According to the plaintiff's evidence, between the time when he was given to understand that Mackay approved of his agent's negotiation and contract, in December, 1888, and when in March, 1889, Mackay came on to New York, all the telegraph properties had been turned over which were in his possession except $115,000 of the bonds; $50,000 of the bonds had been loaned to De Castro, and he had pledged them in October, 1888, to the Madison Square Bank to secure a loan to himself. On December 26th, 1888, Stokes gave De Castro an order on the bank to deliver the bonds to him, De Castro, when his loan was paid. As one of the vendees named in the contract of December 24th, 1888, and as the agent or intermediary of Mackay, this was a sufficient and the only possible delivery, and divested Stokes's title to the bonds in favor of De Castro as Mackay's agent. As to the $115,000 of bonds, they were under pledge to secure a loan to Stokes from the Chemical Bank, and Mackay's position toward Stokes and his declarations to him after his arrival in New York made it unnecessary to do anything about getting them up. He refused to recognize the contract as binding upon him, and simply claimed all the telegraph properties to be his. His attitude was one of distinct repudiation of any obligations toward Stokes. The latter was in the position of having turned over substantially all the property in his possession, and then of hearing Mackay disavow the contract upon the faith of which he had acted. He had divested himself of the control of the telegraph company, and of the great bulk of the securities and properties of which he had become possessed, and stood ready to fulfil every condition, while Mackay, who had seen him give up everything, refused to pay the cash consideration named in the contract. His course was plain. There was a breach of the contract. He had lost the control of the telegraph com-

pany, and had delivered most of the property called for by the contract. He could elect to rely upon the responsibility of the vendees, and sue them upon the contract for what remained to be paid by them of the consideration moneys. This he did, and his offer to make a tender of the bonds yet undelivered, before suit, was expressly waived by De Castro as useless. Indeed, in view of Mackay's express repudiation of the contract, it would have been an unnecessary and meaningless ceremony for Stokes to go through the form of tendering the remaining bonds and no tender was called for. Cornwell *v.* Haight, 21 N. Y. 462 ; Shaw *v.* Republic Ins. Co., 69 N. Y. 286. In the latter case the English rule deducible from the cases was adverted to, that "the positive, absolute refusal by one party to carry out the contract is in itself an immediate complete breach of it on his part, and dispenses the other party from the useless formality of tendering performance of the condition precedent and gives immediate right of action," and it was held that while our decisions may not have gone so far as those of the English courts, yet that where a party has repudiated all obligation, and so declares, it would be "a useless act" after that to make an offer to perform. The law does not compel a man to do a vain and fruitless act.

The situation of the parties was sharply defined. Stokes claimed that a contract had been made with De Castro and Mackay, under which he had substantially performed what was required of him, and that Mackay had become bound, either by his telegrams or by subsequent adoption and ratification. Mackay, on the other hand, repudiated any obligation under the contract ; claimed the telegraph properties were his without any payment, and that Stokes had given up all his interests, relying upon his, Mackay's, generosity as to compensation. Stokes, therefore, elected to sue him upon the contract, and in affirmance thereof to recover that portion of the cash consideration which remained unpaid. That fixed the rights of the parties and presented distinct issues for trial, which would result either in a decision that Mackay was not bound in any way by the contract, and that Stokes had gained no rights thereunder or had abandoned them, or that a contract had been validly made by the terms of which Mackay had become obligated, and that Stokes had done everything on his part which entitled him to enforce that obligation and to recover the moneys demanded. The evidence was such as, in the former judgment of this Court, to require the submission of the case to a jury, and they have decided the contention by their verdict in favor of Stokes, and all questions of fact essential to Stokes's

recovery will be deemed to have been passed upon favorably.

No acts done by the plaintiff after the commencement of the action could affect the cause of action, for the right of action had become vested upon the breach of the contract. That breach consisted in the repudiation of a contract, then substantially executed, and in the refusal to pay the contract price, while retaining practically all the property sold and delivered under the contract. The plaintiff's subsequent acts could only create a cause of action in favor of the defendants. Under the allegations of the complaint, the defendants might, at any time, after the action was commenced, have demanded the bonds yet undelivered upon offering to pay the $75,000 claimed from them. If their delivery had become impossible to the plaintiff, the defendants would have had the right to compel him to account for what he could not deliver; but nothing which might happen to the bonds after the right of action had vested, and was availed of, could divest such right of action. Westfall *v.* Peacock, 63 Barb. 209. That some bonds remained pledged to others to secure liabilities of the plaintiff proves nothing against his right of recovery. If he could not redeem them, he could be compelled to account for the moneys received for them. If any had been converted and passed beyond his control, after the commencement of the action and without fault on his part, at most, if at all under the circumstances, he could be compelled to account for their actual value. The rule is not questioned that by the election to sue upon the contract for the price, the plaintiff has kept alive all his own obligations under it. He recognized them by offering to make tender of what bonds he had not yet delivered and by keeping the tender open in his complaint. The defendants have at all times been entitled, upon offering to pay the $75,000, to have the bonds. Their payment of this judgment will leave them still entitled to demand them, and a failure to comply will create a cause of action in their favor for their value.

We have considered the main question on this appeal with great care, and we think that neither in the rulings upon which it arose, nor in any other of the rulings referred to, was there any error committed which would jusify us in ordering a new trial of the action.

The judgment should be affirmed with costs.

All concur, except HAIGHT, J., not voting.

Judgment affirmed.

WITHERS *v.* REYNOLDS.

IN THE KING'S BENCH, NOVEMBER 14, 1831.

[*Reported in* 2 *Barnewall & Adolphus* 882.]

ASSUMPSIT for not delivering straw to the plaintiff pursuant to agreement. At the trial before Lord Tenterden, C.J., at the sittings in Middlesex after last Hilary Term, the agreement proved was as follows :

"John Reynolds undertakes and agrees to supply Joseph Withers with wheat straw of good quality sufficient for his use as a stable-keeper, and delivered on his premises as above" (that is, at Long Acre, London) "till the 24th of June, 1830, at the sum of thirty-three shillings per load of thirty-six trusses, to be delivered at the rate of three loads in a fortnight, in a dry state and without damage. And the said J. W. hereby agrees to pay to the said J. R. or his order the sum of thirty-three shillings per load for each load of straw so delivered on his premises from this day till the 24th of June, 1830, according to the terms of this agreement.

(Signed.) "JOSEPH WITHERS, JOHN REYNOLDS."

The straw was regularly sent in from October 20th, 1829, when this agreement was made, till the end of January, 1830. At that time the plaintiff being in arrear for several loads of straw, the defendant called upon him for the amount, and he thereupon tendered to the defendant £11 11*s.*, being the price of all the straw delivered except the last load, saying that he should always keep one load in hand. The defendant objected to this ; but was at length obliged to take the sum offered, and he then told the plaintiff that he would send no more straw unless it was paid for on delivery, and accordingly no more was sent. On the part of the defendant it was submitted that there must be a non-suit, inasmuch as the plaintiff, on his own showing, had not performed his own part of the contract, which was, in effect, to pay for each load on delivery. Lord Tenterden, C.J., was of this opinion, but directed a verdict for the plaintiff, reserving the point. A rule *nisi* was afterward obtained for entering a nonsuit.

Campbell and *R. V. Richards* now showed cause.

Platt, *contra*.

LORD TENTERDEN, C.J. I am of opinion that the plaintiff is not entitled to recover. There is, I think, no doubt that by the terms of this agreement the plaintiff was to pay for the loads

of straw as they were delivered. If that were not so, the defendant would have been liable to the inconvenience of giving credit for an indefinite length of time, and, in case of non-payment, bringing an action for a very large sum of money, which does not appear to have been intended by the contract. Then the only question is, whether upon the plaintiff's saying, "I will not pay for the goods on delivery" (for that was the effect of his communication to the defendant), it was incumbent on the defendant to go on supplying straw; and he clearly was not obliged to do so.

PARKE, J. The substance of the agreement was, that the straw should be paid for on delivery. The defendant clearly did not contemplate giving credit. When, therefore, the plaintiff said that he would not pay on delivery (as he did in substance, when he insisted on keeping one load in hand), the defendant was not obliged to go on supplying him.

TAUNTON, J. The contract does not say merely that so much straw shall be supplied at thirty shillings a load, but it adds, that the plaintiff shall pay that sum "for each load of straw delivered on his premises," from the date of the agreement till June 24th, 1830. That *prima facie* imports that each load was to be paid for as delivered.

PATTESON, J. If the plaintiff had merely failed to pay for any particular load, that, of itself, might not have been an excuse to the defendant for delivering no more straw, but the plaintiff here expressly refuses to pay for the loads as delivered; the defendant, therefore, is not liable for ceasing to perform his part of the contract.

Rule absolute.

FREETH AND ANOTHER *v.* BURR.

IN THE COMMON PLEAS, JANUARY 14, 1874.

[*Reported in Law Reports, 9 Common Pleas*, 208.]

THE declaration stated that it was agreed by and between the plaintiffs and the defendant that the defendant should sell and deliver to the plaintiffs, and the plaintiffs should buy and accept of and from the defendant 250 tons of pig iron, at 56*s.* per ton, to be delivered by the defendant to the plaintiffs; that the defendant delivered to the plaintiffs one half of the said 250 tons of pig iron, and that all conditions were fulfilled, etc., to entitle the plaintiffs to have the agreement fulfilled by the defendant

in respect of the matters the breach of which is hereinafter assigned, and to maintain this action. Breach, that the defendant did not nor would deliver to the plaintiffs the residue of the said 250 tons of pig iron according to the agreement; whereby the plaintiffs had been deprived of the profits which would have accrued to them from the delivery of the same, and had been delayed and otherwise injured and damnified in their business, in which the defendant well knew they intended to use the said goods. Claim, £500.

Pleas: 1. That the defendant did not agree as alleged. 2. A denial of the alleged breach. 3. That, after the alleged promise, and before any breach thereof by the defendant, the plaintiffs exonerated and discharged the defendant from his promise and from the performance of the same. 4. That, after the making of the alleged contract, and before any breach thereof by him, the said contract was rescinded and abandoned by mutual assent.

Joinder of issue; and further replication to the third plea, that the plaintiffs were suing, not for a breach of the agreement therein admitted, and from the performance of which the defendant alleged that the plaintiffs exonerated and discharged the defendant, but for the breach of another and subsequent agreement by which the defendant agreed to sell and deliver the said iron to the plaintiffs.

There was a similar replication to the fourth plea.

Rejoinders to the second and third replications—that no such agreement as the supposed other and subsequent agreements in those replications respectively mentioned were made—that the defendant denied the alleged breaches of the said other and subsequent agreements and every of them, and said that he was not guilty thereof. Issue.

The cause was tried before Brett, J., at the sittings in London after last Hilary Term. The plaintiffs and the defendant were iron merchants and manufacturers. In November, 1871, the plaintiffs agreed to buy of the defendant 250 tons of pig iron, and on the 28th of that month bought and sold notes were exchanged. The bought note, signed by the plaintiffs, was as follows:

"London, 28th November, 1871.

"Bought of Messrs. D. M. Burr & Co. two hundred and fifty tons of pig iron, at fifty-six shillings per ton alongside our wharf, Millwall. Half to be delivered in two weeks, remainder in four weeks. Payment, net cash 14 days after delivery of each parcel."

The market was rising, and early in February the plaintiffs wrote to the defendant remonstrating with him for not having delivered any of the iron. About the 15th of that month 10½ tons were sent alongside the plaintiffs' wharf; and on the 20th the plaintiffs wrote to the defendant as follows:

"We are much surprised you should have sent such a paltry lot as 10 tons on account of contract for 250 tons which should have been delivered last December. We must request you will give us a definite time for delivery of at least 50 tons, which must be delivered at once, or we shall have again to buy against you."

On May 17th, 1872, the defendant wrote to the plaintiffs as follows:

"We are informed that the lighter which we sent with 30 tons Kentledge pig iron to your wharf on the 10th instant is still lying there unloaded, and that this has arisen through an undue preference being allowed by you to other barges in discharging, or from some other cause for which you are to blame. We have, therefore, to intimate that we shall hold you liable for demurrage from and after 13th instant."

On the 18th the plaintiffs wrote to the defendant: "In answer to yours of the 17th instant, your barge has been discharged some days. Do you intend to deliver the remainder, or shall we buy against you?"

To this the defendant replied on the 21st: "It is our intention to deliver remainder of pig iron, and do not wish you to buy against us. We enclose invoice of last lot."

On May 29th 126 tons in all having by that time been delivered, the defendant wrote to the plaintiffs: "Would you kindly forward us check in payment of the ballast iron we have delivered to you, and we shall proceed at once to send on the remainder."

The plaintiffs, under an erroneous impression that they were entitled to set off against the defendant's claim any loss which they might incur in case the defendant should fail to deliver the remainder of the iron contracted for, refused to pay for the 125 or 126 tons which had been delivered; and their attorney, in reply to a letter from the defendant's attorney demanding payment, put forward a claim for £250, being £2 per ton on the 125 tons undelivered.

On June 12th the defendant's attorneys wrote to the plaintiffs' attorney: "We hardly think it necessary to refer to your clients' claim for £250, as it is purely hypothetical and could

not possibly arise, as your clients by their own default have obliged our client to refuse to make any further delivery of iron. We must request your clients' immediate attention to the settlement of amount (£352 15*s.* 10*d.*) mentioned in our letter of the 5th instant."

The plaintiffs paid ultimately (but not until after an action had been brought for it) for the first 125 tons of iron ; and this action was brought against the defendant for the breach of his contract in refusing to deliver the second 125 tons.

On the part of the defendant, it was contended that the plaintiffs' refusal to pay for the first parcel of the iron amounted to an abandonment of the contract by them, and absolved the defendant from his obligation further to perform it on his part. Hoare *v.* Rennie[1] was relied on.

The learned judge ruled that the mere refusal by the plaintiffs to pay for the first 125 tons did not exonerate the defendant from his obligation under the contract to deliver the second 125 tons, and consequently that the plaintiffs were entitled to recover such damages as they had sustained from the non-delivery, and he directed a verdict to be entered for the plaintiffs for £148 16*s.*, reserving leave to the defendant to move to enter a nonsuit if the Court should be of opinion that the refusal by the plaintiffs to pay for the iron delivered amounted to an abandonment of the contract.

Garth, *Q.C.*, in Easter Term last obtained a rule *nisi* accordingly.

Watkin Williams, *Q.C.*, and *E. Clarke*, who appeared to show cause, were stopped by the Court.

Garth, *Q.C.*, and *Philbrick* in support of the rule.

LORD COLERIDGE, C.J. The question in this case arises upon a contract for the sale of iron entered into between the plaintiffs and the defendant on November 28th, 1871, in the following terms : " Bought of Messrs. D. M. Burr & Co. 250 tons of pig iron, at 56*s.* per ton alongside our wharf, Millwall. Half to be delivered in two weeks, remainder in four weeks. Payment, net cash fourteen days after the delivery of each parcel." The material facts were these : There was no delivery in the terms of the contract of either parcel of the iron. In point of fact, the delivery of the first 125 tons was by mutual arrangement delayed, and the last delivery of that parcel did not take place until May 12th, 1872. There was a correspondence between the parties, pressure by the purchasers for delivery, and excuses by the vendor for the non-delivery. That the former were anxious for the completion of the contract appears to be

[1] 5 H. & N. 19 ; 29 L. J. (Ex.) 19.

clear, as well from the tenor of the correspondence as from the fact that the market was rising. A few days after the full delivery of the first parcel—viz., on May 29th, 1872—the defendant demanded payment for the 125 tons, which the plaintiffs refused, claiming to set off damages for the defendant's breach of contract. The plaintiffs afterward demanded delivery of the remaining 125 tons, and upon the defendant's refusal to comply with that demand this action was brought. The question is whether the fact of the plaintiffs' refusal to pay for the 125 tons delivered was such a refusal on the part of the purchasers to comply with their part of the contract as to set the seller free and to justify his refusal to continue to perform it. This certainly appears—viz., that there was an extension by mutual consent of the time for the delivery of the iron from December, 1871, to May, 1872, with constant pressure on the one side and excuses and resistance on the other. I mention that because it is important to express my view that, in cases of this sort, where the question is whether the one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract. I say this in order to explain the ground upon which I think the decisions in these cases must rest. There has been some conflict among them. But I think it may be taken that the fair result of them is as I have stated —viz., that the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract. Now, non-payment on the one hand, or non-delivery on the other, may amount to such an act, or may be evidence for a jury of an intention wholly to abandon the contract and set the other party free. That is the true principle on which Hoare *v.* Rennie[1] was decided, whether rightly or not upon the facts, I will not presume to say. Where by the non-delivery of part of the thing contracted for the whole object of the contract is frustrated, the party making default renounces on his part all the obligations of the contract. That is the ground upon which it is said in Jonasshon *v.* Young[2] that that case may be supported. In Withers *v.* Reynolds[3] there was an express refusal by the plaintiff to perform the contract ; and Patteson, J., says : " If the plaintiff had merely failed to pay for any particular load, that of itself might not have been an excuse to the defendant for delivering no more straw, but the plaintiff here expressly refuses to pay for the loads as delivered ; the defend-

[1] 5 H. & N. 19 ; 29 L. J. (Ex.) 19. [2] 4 B. & S. 296 ; 32 L. J. (Q. B.) 385.
[3] 2 B. & Ad. 882.

ant, therefore, is not liable for ceasing to perform his part of the contract." Wightman, J., certainly, and Crompton, J., by inference, in Jonasshon *v.* Young,[1] both uphold that case upon the principle on which I rely. The principle to be applied in these cases is, whether the non-delivery or the non-payment amounts to an abandonment of the contract or a refusal to perform it on the part of the person so making default. That being so, and my Brother Brett having ruled that the mere non-payment for the first portion of the iron contracted for, unattended by any other act on the part of the purchasers, did not put an end to the contract so as to disentitle the purchasers to maintain an action for the non-delivery of the second portion, but only gave the seller a remedy by cross-action (of which he has availed himself), I am of opinion that his ruling was correct, and that the rule should be discharged.

Rule discharged.[2]

HONCK *v.* MULLER.

IN THE COURT OF APPEAL, APRIL 1, 1881.

[*Reported in Law Reports*, 7 *Queen's Bench Division*, 92.]

IN this action the plaintiff sought to recover damages from the defendant for refusing to deliver to the plaintiff one third of 2000 tons of iron in December, 1879, and one third of such iron in January, 1880, according to the terms of the following contract of sale :

"MIDDLESBOROUGH-ON-TEES, October 27, 1879.

"Sold to JOHN HONCK, Esq.,

"8 Hill Side,

"Crouch Hill, London,

"2000 (two thousand) tons No. 3 G. M. B. Middlesbro' pig iron, at 42*s.* (forty-two shillings) per ton, f. o. b. maker's wharf here.

"Delivery November, 1879, or equally over November, December, and January next at 6*d.* per ton (sixpence) extra.

"Payment, net cash here against bills of lading.

"Tees conservancy dues payable by shipper.

"Under this contract buyer and seller alike shall be free from

[1] 4 B. & S. at p. 299.

[2] The concurring opinions of Keating and Denman, JJ., have been omitted.—ED.

any liability, should they be unable to receive or deliver owing to strikes or other combinations, or to accidents or such like unavoidable circumstances, and the contract shall be prolonged for a period corresponding to the duration of interruptions arising from any of the above causes.

(Signed) " per pro E. C. MULLER.
T. C. DAVISON."

The defence as pleaded, was mainly, *inter alia*, that the plaintiff made default in taking delivery in November, or in declaring whether he would take the whole or part only of the contract quantity in that month, and that therefore the defendant was entitled to give the plaintiff notice, as he did, that he would not deliver any of the said iron to the plaintiff. The defendant, however, paid £66 13*s*. into court to satisfy the plaintiff's claim, lest contrary to what the defendant contended for, the plaintiff should be entitled to recover anything in the action.

The plaintiff replied that the sum paid into court was not sufficient to satisfy his claim, and issue being joined on the statement of defence, the cause was tried before Field, J., in London, during the Trinity sittings of last year. At that trial it was proved that on November 1st, 1879, the defendant wrote to Mr. Caleb Bloomer, the broker in London, through whom the plaintiff bought the iron of the defendant, asking for a delivery order, and requesting to know whether there was any chance of the plaintiff's taking the whole of the iron in that month of November; and to that letter Mr. Bloomer replied that Mr. Honck could not yet decide, but that he would give seven days' notice of his decision when he had decided. Several other letters passed between the parties, of which the following only are material.

" MIDDLESBOROUGH, November 17, 1879.

" JOHN HONCK, Esq., London.

" DEAR SIR: I beg reference to contract of 27th October for 2000 tons pig iron, according to which you have the faculty to take the whole in November, or one third in each month, November, December, and January. Will you be good enough to inform me what quantity you wish to take this month over and above the minimum quantity of 666 tons due this month, and kindly send me your delivery instructions.

" I am, yours truly,
(Signed) " per pro E. C. MULLER,
T. C. DAVISON."

"5 Union Court Chambers, Old Broad Street,
London, E.C., November 22, 1879.

"E. C. Muller, Esq.

"Dear Sir: I am sorry I was out on the several occasions of your calling here this week, for it would have given me pleasure to have a talk. Mr. Honck asks me to say he will be obliged if you will defer shipping any of his iron until December, so allowing him to take delivery of all in December and January.

(Signed) "Caleb Bloomer."

"Middlesbro', December 1, 1879.

"Mr. John Honck.

"Dear Sir: I beg to refer you to my (letter) of 17th ult. to which I have received no reply. I have since then written several times also to your broker, Mr. Caleb Bloomer, pressing for orders for delivery of your iron, but could elicit no satisfactory reply. You ought to have taken delivery of a large portion of your iron during last month, and as you have failed to do so, I have been put in a very awkward position with regard to your whole contract—in fact, I cannot keep any contract on my books which is not executed properly. I must therefore give you notice that I have removed from my books and cancelled the contract for 2000 tons No. 3, which you had with me. I do this in order to protect myself from any further loss in the matter.

"I remain, yours truly,
(Signed) "E. C. Muller."

"London, December 2, 1879.

"E. C. Muller, Esq.

"Dear Sir: Yours to hand in due course. My reason for not replying to yours of the 17th was that Mr. Bloomer, my broker, did so; and as the end of the month drew on prices hardened; hence, the reason I did not give shipping orders. I am therefore at a loss to see your reason for saying you have cancelled my contract to prevent further loss. In fact, I will not allow such a thing to be done.

"My iron is under offer, and I expect it to be accepted; you must therefore accept notice that I hold you responsible for any loss in any case. You will have shipping orders in a few days.

"Yours truly,
(Signed) "John Honck."

The defendant replied by saying that he should stand by his letter of December 1st, and he persisted afterward in holding the contract to be cancelled.

The plaintiff sold the iron he had so bought of the defendant to Messrs. McArthur, Son & Co., who sold it to Messrs. J. Watson & Co., and the defendant having refused to deliver the iron the present action was brought, in which the plaintiff claimed the difference between the contract and market price of 666⅔ tons, being one third of the iron at the end of December, 1879, and of 666⅔ tons at the end of the following January.

At the trial a verdict and judgment was given for the plaintiff for £933 6*s.* 8*d.*, less the £66 13*s.* which the defendant had paid into court.

The defendant afterward obtained from the Queen's Bench Division a rule *nisi* for a new trial, which was subsequently discharged, and thereupon the defendant appealed, and gave notice that this Court would be asked to give judgment for the defendant.

McIntyre, *Q.C.*, and *Henn Collins* for the defendant.

C. Russell, *Q.C.*, and *Channell* for the plaintiff.

BRAMWELL, L.J. I think it unnecessary to determine which of the several meanings put on the agreement in this case is right. For whichever is adopted, I think the result should be the same. But it seems to me that the meaning is that the plaintiff had the option to have the 2000 tons in November, or in equal portions in November, December, and January ; and that unless he elected in November in time to have the whole delivered in November if he so elected, or in time to have one third delivered in November if he elected to have the iron in three deliveries, he has no cause of action. And I think he did not elect. Such election, of course, includes notice of his option to the defendant. He certainly did not say in November that he would have all in November, nor did he say he would have three deliveries. What I have said seems to me the natural meaning. If it is not, then the contract means 2000 tons in November, unless the plaintiff should elect as he might to have them in equal portions in November, December, and January. I think he did not so elect, and having failed to take the 2000 tons in November, has no cause of action. But I will assume as the plaintiff says, though I think otherwise, that whichever construction is right the plaintiff elected to have the iron in three equal portions in November, December, and January. I am of opinion even then that the defendant is entitled to our judgment. Before saying why, I think it fair to the defendant to say I can see no shuffling in his conduct, nor any motive for repudiating the bargain other than a legitimate one. I do not find that iron had risen in price. I think it very likely the iron was at the wharf of the seller, and that the plaintiff

was pressed by him to take it. But however this may be, I think his contention right.

The case for the plaintiff is, that by the contract, or what was done under it, he was to take and was entitled to have 666⅔ tons in each of the months of November, December, and January. That though he (the plaintiff) broke his contract in not taking the 666⅔ in November, and though the defendant at once gave notice he would not go on with the contract he (the plaintiff) has a right to insist on the December and January deliveries. In other words, the plaintiff says that having agreed to take 2000 tons he has a right or power to demand and take 1333⅓ and no more. I cannot think so. I think that contention is contrary to law and justice alike. I think where no part of a contract has been performed, and one party to it refuses to perform the entirety to be performed by him, the other party has a right to refuse to perform any part to be performed by him. I think if a man sells 2000 tons of iron he ought not to be bound to deliver 1333⅓ only, if it can be avoided. I can see no difference in principle between where the deliveries are at different dates and where they are to be all at once. I think the plaintiff no more entitled to the delivery of these 1333⅓ tons than he would be if he was to take 2000 tons in November, and send shipping for 1333⅓ tons only in that month at such a time that no more could be delivered, and he said that he would take no more. Suppose it was a purchase of 100 yards of silk at so much a yard, and the buyer came for 50 only, could he insist on it? Would it make any difference that 50 yards were to be taken and paid for on Monday and 50 on Tuesday, and the Monday's delivery was not taken but refused, and then the Tuesday's was demanded? If there was a charter for an out-and-home voyage, and the charterer refused to load for the out voyage, could he insist on the ship taking his cargo for the home voyage? Suppose 10,000 tons of coal bought to be delivered at Gibraltar, Aden, and Bombay, in equal quantities—at Bombay in January, at Aden in February, and at Gibraltar in March, and no delivery at Bombay, could the buyer be made to take the other deliveries? Suppose a contract to supply bread to a workhouse for a year from January 1st, and the contractor says he will supply and does supply none in January, can he insist on supplying in the other eleven months? Suppose he does not supply for eleven months, can he insist on supplying in December? Would it make any difference if he was paid monthly? I hope not—I think not. Suppose a man orders a suit of clothes, the price being £7—£4 for the coat, £2 for the trousers, and £1 for the waistcoat—can he be made

to take the coat only, whether they were all to be delivered together, or the trousers and waistcoat first? The party to a contract so broken has a right not to rescind the contract, for rescission is the act of both parties, but a right to declare he will not perform a part only of his contract—viz., what would remain to be performed if the other party had performed his part, and so enabled the performance of the whole. If, indeed, the contract has been part performed and cannot be undone, then it must be proceeded with without such power of declaring off. If in this case the plaintiff had taken the November delivery, but had refused the December, the defendant would have been bound to make the January delivery. See what the consequence is of a different conclusion. The defendant would sell 2000 tons of iron and have so many pounds sterling. He is made to sell two thirds only of the iron and have two thirds only of the pounds sterling and a right of action. Suppose the November delivery would have been a profit to the defendant, and the December and January deliveries a loss, why is he to bear the loss and have no security that he will get the profit? This reasoning would no doubt apply where there is part performance, but then there is no help for it. It is asked whether every trifling breach of contract is attended with this consequence. I know not, but $666\frac{2}{3}$ tons out of 2000 are not a trifle. If it must be something which goes to the "root" of the contract, as was said, surely one third of the subject-matter does. The case of Hoare *v.* Rennie[1] is in point. The same thing was decided a few days ago in Englehart *v.* Bosanquet.[2] It was there held that on a sale of 2000 tons of sugar to come in two ships when the first ship was not equal to contract, the buyer was not bound to take the other. But it is said that Hoare *v.* Rennie[3] has been overruled by Simpson *v.* Crippin.[4] That is not so. That decision was quite right. The case was distinguishable from Hoare *v.* Rennie,[5] for the contract had been part performed and could not therefore be undone. One may express a respectful agreement with what the learned judges said in Simpson *v.* Crippin[6]—viz., that they did not understand Hoare *v.* Rennie.[7] The other cases cited are distinguishable on the same ground. It has never yet been held that a man may break his contract, render the performance of the whole impossible, and though nothing has been done under it, insist on the performance of the remainder. Pordage *v.* Cole[8] has

[1] 5 H. & N. 19; 29 L. J. (Ex.) 73.
[2] Not reported.
[3] 5 H. & N. 19; 29 L. J. (Ex.) 73.
[4] Law Rep. 8 Q. B. 14.
[5] 5 H. & N. 19; 29 L. J. (Ex.) 73.
[6] Law Rep. 8 Q. B. 14.
[7] 5 H. & N. 19; 29 L. J (Ex.) 73.
[8] 1 Wm. Saund. 319.

absolutely nothing to do with the case. That was an action on a specialty. This is not. As to the argument that in a case like the present there are really three contracts for three parcels, that is wholly erroneous. In parol contracts, the whole of what is to be done on one side is the consideration for the whole of what is to be done on the other. The seller does not sell, the buyer does not buy, any parcel of 666⅔ tons any more than when the suit of clothes is sold there is a separate sale of coat, waistcoat, and trousers.

I am of opinion that the judgment should be reversed.

BAGGALLAY, L.J. The agreement in this case was for the sale by the defendant to the plaintiff of 2000 tons of iron to be delivered at Middlesborough in November, 1879, or at the option of the plaintiff in equal proportions, but at an increased price of 6*d.* per ton, in the months of November, December, and January.

In the course of the argument three different views have been suggested as to the true meaning of the agreement :

1. That relied on by the plaintiff, that, unless he made an election to take all in November, the contract was for the delivery in three equal portions in the three months.

2. That relied upon by the defendant, that the plaintiff was bound to make his election in November, and to communicate it to the defendant in sufficient time to enable the defendant to deliver the whole or the one third, as the case might be, in that month.

3. An alternative suggestion of the defendant that the plaintiff was to take the 2000 tons in November, unless he gave notice to the defendant before the expiration of that month that he elected to have the cargo delivered in equal portions in the three months.

I agree with Bramwell, L.J., in thinking that the second view, that contended for by the defendant, is the most in accordance with the language of the correspondence, and further, that whether it or the third be adopted, the plaintiff has no cause of action. It is not suggested that any notice was given by the plaintiff in the month of November. This would appear to me to be sufficient to entitle the appellant to a reversal of the decision from which he has appealed. But so strong an argument has been addressed to us in support of the construction of the contract contended for by the plaintiff, that I deem it right to express my opinion as to what our decision ought to be, upon the basis of such construction being adopted.

As to this also I have arrived at the same conclusion as Bramwell, L.J. Were it not for the authority of Simpson *v.* Crippin,[1]

[1] Law Rep. 8 Q. B. 14.

which has been much pressed upon us, I should have felt no doubt as to the propriety of holding that the refusal by the plaintiff to accept the first portion of the cargo, in accordance with the provisions of the contract as construed by himself, was a sufficient justification for the defendant's refusal to deliver the remaining portions. It is, to my mind, impossible to reconcile the decision in Simpson *v.* Crippin[1] with that in Hoare *v.* Rennie,[2] except in the manner pointed out by Bramwell, L.J., but I do not find that the decision in Simpson *v.* Crippin[3] was in any way rested upon the distinction pointed out by the Lord Justice. Indeed, Mellor, J., stated in his judgment that he was unable to distinguish the two cases. If, then, the decision in Simpson *v.* Crippin[4] is to be considered as conflicting with that in Hoare *v.* Rennie,[5] and I think it was so considered by the judges who decided it, I am bound to say that I adopt the principles enunciated in the latter case as being more in accordance with reason and justice than those upon which the former was expressed to be decided. The principles upon which that case was decided are so clearly expressed in the reported judgments, that I need not refer to them in detail. I may mention that in the case of Bradford *v.* Williams,[6] which was decided in the early part of the same year as Simpson *v.* Crippin,[7] Hoare *v.* Rennie[8] was quoted and recognized, and the principles upon which it was decided adopted. Bradford *v.* Williams[9] was mentioned in argument in Simpson *v.* Crippin,[10] but was not noticed in any of the judgments. I am of opinion that the judgment should be reversed.

BRETT, L.J. I am sorry to say that in this case I differ from the views of the two other members of this Court.

This is the case of a contract for the sale and delivery of goods at a price per ton. If the price were one whole price for the whole amount to be delivered, the sort of question which has arisen in this case would not have arisen. The long discussion which has taken place as to this kind of contract, is where the contract is for separate and successive deliveries of goods at a price per ton. It does not seem to me to be necessary in this case to determine precisely the rights of the parties as to deliveries under this contract. I am, however, inclined to think that where, as in this case, the contract is for the delivery of goods by the vendor free on board, the choice as to

[1] Law Rep. 8 Q. B. 14.
[2] 5 H. & N. 19; 29 L. J. (Ex.) 73.
[3] Law Rep. 8 Q. B. 14.
[4] *Ibid.*
[5] 5 H. & N. 19; 29 L. J. (Ex.) 73.
[6] Law Rep. 7 Ex. 259.
[7] Law Rep. 8 Q. B. 14.
[8] 5 H. & N. 19; 29 L. J. (Ex.) 73.
[9] Law Rep. 7 Ex. 259.
[10] Law Rep. 8 Q. B. 14.

whether the whole is to be delivered in November or whether it is to be in three successive periods, is the choice of the person who has to deliver, and therefore that the choice was with the defendant, but it is immaterial to determine this. In the result, this case seems to me to be a contract for the delivery of iron at three different periods at a price per ton. The action is for non-delivery, and the question is whether the failure of the plaintiff to take the first delivery prevents him from requiring a delivery at the two successive periods.

Now it is admitted that if the first delivery was made, and the second was not, but the third was, that then the failure by the seller to offer the second delivery would be no objection to his right to insist upon the acceptance of the third. That is admitted. But it is said that if there be a failure to offer the first delivery, the acceptance of the second cannot be insisted upon. Now what is the rule of law by which a court of law ought to deal with mercantile transactions of this kind? To my mind merchants are not bound to make their contracts according to any rule of law, but the court of law, from the language which has been used, and from the known course of business among merchants with regard to the subject-matter of such contracts, must determine what is the interpretation to be put on such contracts among reasonable merchants, and when they have ascertained what that is, the court ought to apply it to the particular contract in question in the way in which reasonable business men, in the ordinary course of business, would apply it.

Now such a contract as this in the present case, for successive deliveries of goods at a sum per measure, is a somewhat modern kind of contract, but it has now been in existence for many years. It has been frequently considered, and the rule with regard to its construction seems to me to be this, that where the deliveries are to be so made, and the price of each to be so determined, then, inasmuch as the failure to perform one of the deliveries can be satisfied by damages, the failure in respect of one delivery does not prevent the party from having the other deliveries. That is not what is decided in Pordage *v.* Cole,[1] but is the doctrine contained in the notes to that case. The courts have not laid down that doctrine as an abstract proposition of law, but they have gathered it from the course of business among merchants, that where merchants have so contracted by separating the price, as in case of failure of one of the deliveries, to give an adequate remedy for it, that it is not their intention that such non-delivery should put an end to

[1] 1 Wm. Saund. 319 *l.*

the contract and prevent the party so failing from having a right to make subsequent deliveries.

But it is suggested that if there is a failure in the first delivery, then the party against whom that failure is committed may throw up the contract. But why? Supposing at the time of the first delivery there is no difference between the market price and the contract price of the goods, the person against whom the failure is made suffers positively no loss. But at the time of the second delivery the difference between the market price and the contract price may be enormous; yet at the time of the third delivery it is said, if you have fulfilled the contract as to the first delivery, where it did not signify whether you did or not, but have failed in the second delivery, where it was of the utmost consequence, nevertheless, you can insist upon the third delivery, but if you have failed in the first delivery, where it was of no consequence at all, then, although the question of delivery of the second and third is of the utmost consequence, your right to them is to be of no avail. It seems to me that such a conclusion is so strained that, with the greatest possible respect, I should say as matter of business it is absurd. Then is one bound to come to such a conclusion when one's duty is to apply that which would be the conduct of all reasonable merchants? It seems to me that one is not. The notes to Pordage *v.* Cole[1] seem to me to be clear, and to make no distinction whatever as between the first delivery or any other. The case of Simpson *v.* Crippin[2] distinctly states there is no difference with regard to the first delivery or any other. It is objected to that case that the learned judges said they did not understand the case of Hoare *v.* Rennie.[3] It seems to me not that they meant to say they did not understand Hoare *v.* Rennie,[4] but that they could not understand that the principle of law was rightly applied there. In other words, they meant to say they differed from Hoare *v.* Rennie.[5] So do I for the reasons I have given. In my opinion Hoare *v.* Rennie[6] was wrongly decided, and I prefer Simpson *v.* Crippin.[7] I prefer what Lord Blackburn said in that last case—namely, in such a contract as this the doctrine contained in the notes to Pordage *v.* Cole[8] ought to be applied. With regard to the case of Englehart *v.* Bosanquet,[9] the facts there seem to have been exactly like those in Hoare *v.* Rennie,[10] and therefore the judges were

[1] 1 Wm. Saund. 319 *l.*
[2] Law Rep. 8 Q. B. 14.
[3] 5 H. & N. 19; 29 L. J. (Ex.) 73.
[4] *Ibid.*
[5] *Ibid.*
[6] *Ibid.*
[7] Law Rep. 8 Q. B. 14.
[8] 1 Wm Saund. 319 *l.*
[9] Not reported.
[10] 5 H. & N. 19; 29 L. J (Ex) 73.

bound to follow that case. But in the Court of Appeal we are not bound to do so, and I prefer the doctrine laid down in Simpson *v.* Crippin[1] by the judges who, to my mind, showed that in their opinion Hoare *v.* Rennie[2] was wrongly decided. I think that they were right and that Hoare *v.* Rennie[3] was wrong.

Judgment reversed.

THE MERSEY STEEL & IRON CO., LIMITED, APPELLANTS, *v.* NAYLOR, BENZON & CO., RESPONDENTS.

IN THE HOUSE OF LORDS, MARCH 28, 1884.

[*Reported in Law Reports*, 9 *Appeal Cases*, 434.]

APPEAL from an order (dated June 13th, 1882) of the Court of Appeal (Jessel, M.R., Lindley and Bowen, L.JJ.) reversing an order of Lord Coleridge, C.J. The facts are fully set out in the report of the decisions below.[4] All the facts material to the present report are stated in the head-note. It may be added that the referee having found that the damages due to the defendants for non-delivery amounted to £1723, being in excess of the £1713 admitted to be due to the plaintiffs for the price of the steel delivered, the Court of Appeal by an order dated April 13th, 1883, gave judgment for the defendants with costs. The plaintiffs appealed from this order also.

A. Cohen, *Q.C.*, and *French* (*C. Russell*, *Q.C.*, with them) for the appellants.

Sir F. Herschell, *S.G.* (*Bigham*, *Q.C.*, with him), for the respondents.

EARL OF SELBORNE, L.C. Upon the other point,[5] I do not think it desirable to lay down larger rules than the case may require, or than former authorities may have laid down for my guidance, or to go into possible cases differing from the one with which we have to deal. I am content to take the rule as stated by Lord Coleridge in Freeth *v.* Burr,[6] which is in substance, as I understand it, that you must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other; you must examine what that conduct is, so

[1] Law Rep. 8 Q. B. 14.
[2] 5 H. & N. 19; 29 L. J. (Ex.) 73.
[3] *Ibid.*
[4] 9 Q. B. D. 648.
[5] Only so much of the opinion is given as relates to this point.—ED.
[6] Law Rep. 9 C. P. 208.

as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part; and I think that nothing more is necessary in the present case than to look at the conduct of the parties, and see whether anything of that kind has taken place here. Before doing so, however, I must say one or two words in order to show why I cannot adopt Mr. Cohen's argument, as far as it represented the payment by the respondents for the iron delivered as in this case a condition precedent, and coming within the rules of law applicable to conditions precedent. If it were so of course there would be an end of the case; but to me it is plain beyond the possibility of controversy, that upon the proper construction of this contract it is not and cannot be a condition precedent. The contract is for the purchase of 5000 tons of steel blooms of the company's manufacture; therefore it is one contract for the purchase of that quantity of steel blooms. No doubt there are subsidiary terms in the contract, as to the time of delivery, "Delivery 1000 tons monthly commencing January next;" and as to the time of payment, "Payment, net cash within three days after receipt of shipping documents;" but that does not split up the contract into as many contracts as there shall be deliveries for the purpose, of so many distinct quantities of iron. It is quite consistent with the natural meaning of the contract, that it is to be one contract for the purchase of that quantity of iron, to be delivered at those times and in that manner, and for which payment is so to be made. It is perfectly clear that no particular payment can be a condition precedent of the entire contract, because the delivery under the contract was most certainly to precede payment; and that being so, I do not see how, without express words, it can possibly be made a condition precedent to the subsequent fulfilment of the unfulfilled part of the contract, by the delivery of the undelivered steel.

But quite consistently with that view, it appears to me, according to the authorities and according to sound reason and principle, that the parties might have so conducted themselves as to release each other from the contract, and that one party might have so conducted himself as to leave it at the option of the other party to relieve himself from a future performance of the contract. The question is whether the facts here justify that conclusion? Now the facts relied upon, without reading all the evidence, are these. The company at the time when the money was about to become payable for the steel actually delivered fell into difficulties, and a petition was presented against

them. There was a section in the Companies Act 1862 (§ 153), which appeared to the advisers of the purchasers to admit of the construction, that until in those circumstances the petition was disposed of by an order for the company to be wound up or otherwise, there would be no one who could receive, and could give a good discharge for, the amount due. There is not, upon the letters and documents, the slightest ground for supposing either that the purchasers could not pay, or that they were unwilling to pay, the amount due ; but they acted as they did, evidently *bonâ fide*, because they doubted, on the advice of their solicitor, whether that section of the act, as long as the petition was pending, did not make it impossible for them to obtain the discharge to which they had an unquestionable right. And therefore the case which I put during the argument is analogous to that which according to the advice they received they supposed to exist—namely, the case of a man who has died between the delivery and the time when payment ought to be made, he being the only person to whom payment is due ; and of course until there is a legal personal representative of that person no receipt can be given for the money. By the Act of Parliament, in the event of a winding-up order being made, it would date from the time when the petition was presented ; and this clause, which no doubt, according to its true construction, only deals with alienations of the property of the company, was supposed by the solicitor of the purchasers to make it questionable whether the payment of a debt due to the company, to the persons who if there had been no petition would have had a right to receive it, might not be held, in the event of a winding-up order being made, to be a payment of the property of the company to a wrong person and therefore an alienation. I cannot ascribe to their conduct, under these circumstances, the character of a renunciation of the contract, a repudiation of the contract, a refusal to fulfil the contract. It is just the reverse ; the purchasers were desirous of fulfilling the contract ; they were advised that there was a difficulty in the way, and they expressed anxiety that that difficulty should be as soon as possible removed, by means which were suggested to them, and which they pointed out to the solicitors of the company. The company evidently took up the attitude, in that state of things, of treating the default as one which released them from all further obligation. On February 10th, which was before the winding-up order was made, and while that state of things still continued, the company by their secretary wrote to say that they thought (being so far correct and thinking rightly) that the objection was not well founded in

law ; and they added : " We shall therefore consider your refusal to pay for the goods already delivered as a breach of contract on your part and as releasing us from any further obligations on our part." I think that they were wrong in that conclusion, and that there is no principle deducible from any of the authorities which supports that view of such—I hardly like to call it a refusal—of such a demur, such a delay or postponement, under those circumstances.

The company, until they were wound up, never receded from that position which they took up on February 10th, 1881 ; and it appears to me to be clear that the liquidator adopted it, and never departed from it, and that the repudiation of the contract on insufficient grounds on the part of the company, which had taken place while the petition was pending and before the winding-up order was made, was adhered to after the winding-up order was made, on the part of the liquidator. On the other hand, it seems to me that, fairly and reasonably considered, the conduct of the respondents was justifiable. Upon February 17th, 1881, after the making of the winding-up order, they state that there are instalments which ought to have been delivered, but which have not been delivered, in respect of which they would have a claim for damages, and that they apprehend that they would have a right to deduct those damages from any payments then due from them ; and, according to the view which has been taken in the Court of Appeal of the effect of § 10 of the Act of 1875, and in which view I believe your Lordships agree, that was the right way of looking at the matter. Then the respondents go on to say, that they are prepared to accept all deliveries which the liquidator may make under the contract, and to pay everything due, only requesting that those payments may be considered as made upon this understanding, in substance, that the right to the set-off which exists in law for the damages shall not be prejudiced—a perfectly reasonable, defensible, and justifiable proposal. And the solicitor who writes the letter adds, " Or I think it probable that my clients would consent to accept delivery now and waive the damages," a thing which in a later letter they express their willingness to do. In my judgment, they have not in any portion of the proceeding acted so as to show an intention to renounce or to repudiate the contract, or to fail in its performance on their part.

Therefore I think that the judgment of the Court below is right, and that this appeal should be dismissed with costs, and I so move your Lordships.

Lord Blackburn. My Lords, I am of the same opinion. On the effect of § 10 of the Act of 1875, I will only say that I

perfectly agree with what the Court below have said and with what has been said by the Lord Chancellor.

As to the first point, I myself have no doubt that Withers *v.* Reynolds[1] correctly lays down the law to this extent, that where there is a contract which is to be performed in future, if one of the parties has said to the other in effect, "If you go on and perform your side of the contract I will not perform mine" (in Withers *v.* Reynolds[2] it was, "You may bring your straw, but I will not pay you upon delivery as under the contract I ought to do. I will always keep one bundle of straw in hand so as to have a check upon you"), that in effect amounts to saying, "I will not perform the contract." In that case the other party may say, "You have given me distinct notice that you will not perform the contract. I will not wait until you have broken it, but I will treat you as having put an end to the contract, and if necessary I will sue you for damages, but at all events I will not go on with the contract." That was settled in Hochster *v.* De la Tour[3] in the Queen's Bench, and has never been doubted since; because there is a breach of the contract although the time indicated in the contract has not arrived.

That is the law as laid down in Withers *v.* Reynolds.[4] That is, I will not say the only ground of defence, but a sufficient ground of defence. In Freeth *v.* Burr[5] it was also so laid down; and Lord Coleridge here thinks the facts were such as to bring the case within that principle. I will not at this time of the day go through them, but when the facts are looked at it is to me clear that that is not so. So far from the respondents saying that when the iron was brought in future they would not pay for it, they were always anxious to get it, and for a very good reason, that the price had risen high above the contract price. There was a statement that for reasons which they thought sufficient they were not willing to pay for the iron at present; and if that statement had been an absolute refusal to pay, saying, "Because we have power to do wrong we will refuse to pay the money that we ought to pay," I will not say that it might not have been evidence to go to the jury for them to say whether it would not amount to a refusal to go on with the contract in future, for a man might reasonably so consider it. But there is nothing of that kind here; it was a *bonâ fide* statement, and a very plausible statement. I will not say more. I refrain from weighing its value at this moment; but, as I said before, it prevents the case from coming within the authority of Withers *v.* Reynolds[6] and Freeth *v.* Burr,[7] and consequently,

[1] 2 B. & Ad. 882. [2] *Ibid.* [3] 2 E. & B. 678. [4] 2 B. & Ad. 882.
[5] Law Rep. 9 C. P. 208. [6] 2 B. & Ad. 882. [7] Law Rep. 9 C. P. 208.

as I understand it, Lord Coleridge made a mistake in the ground on which he went. The rule of law, as I always understood it, is that where there is a contract in which there are two parties, each side having to do something (it is so laid down in the notes to Pordage *v.* Cole,[1] if you see that the failure to perform one part of it goes to the root of the contract, goes to the foundation of the whole, it is a good defence to say, "I am not going on to perform my part of it when that which is the root of the whole and the substantial consideration for my performance is defeated by your misconduct." But Mr. Cohen contended that whenever there was a breach of the contract at all (I think he hardly continued to contend that after a little while, but he said whenever there was a breach of a material part of the contract) it necessarily went to the root of the matter. I cannot agree with that at all. I quite agree that when there were a certain number of tons of the article delivered, it was a material part of the contract that the man was to pay, but it was not a part of the contract that went to the root of the consideration in the matter. There was a delay in fulfilling the obligation to pay the money, it may have been with or without good reason (if that would have made any difference), but it did not go to the root or essence of the contract, nor do I think that there is any sound principle upon which it could do so. I repeatedly asked Mr. Cohen whether or not he could find any authority which justified him in saying that every breach of a contract, or even a breach which involved in it the non-payment of money which there was an obligation to pay, must be considered to go to the root of the contract, and he produced no such authority. There are many cases in which the breach may do so ; it depends upon the construction of the contract. With regard to the case of Hoare *v.* Rennie[2] it has been said that the Chief Baron there went so far as to say that it was the essence and substance of the contract that the whole of the 166 tons of iron, and no less, should be delivered. If it was so, it would follow that when in the present case the January shipment had not been made, and the company could only deliver part of the quantity, it went to the essence of the contract. The question depends upon whether the whole and no less is the essence of it. And again in Honck *v.* Muller,[3] which has been referred to, it is expressly and pointedly shown that that was the ground taken, and the noble and learned Lord opposite (Lord Bramwell) stated that in his opinion the contract of the one party was to deliver and of the other to take 2000 tons of iron, and that inasmuch as it was to be by three

[1] 1 Wms. Saund. 548 (ed. 1871). [2] 5 H. & N. 19. [3] 7 Q. B. D. 92.

instalments and the first was gone, and there never could be more than two thirds of the quantity, the thing bargained for being the whole quantity of iron and no less, the defendant was not bound to deliver two thirds when the plaintiff required the two thirds only. Supposing that that was the true construction of the contract, I think that that would be the right conclusion. The present Master of the Rolls seems, if I understand him rightly, to have thought that that was not the true construction of the contract; whether it was or not I do not express any opinion, except to point out that whatever be the construction of other contracts, there is not in my mind the slightest pretext for saying that such is the construction of this contract ; and that being so, these cases have really no bearing upon the matter.

The circumstances being as I have said, the contract not being such as to make this payment a condition precedent, or to make punctual payment for one lot of iron which has been delivered a matter causing the contract to deliver other iron afterward to be a dependent contract, being of opinion that that is not the meaning of the contract, I think that the decision of the Court of Appeal was right.

LORD FITZGERALD. My Lords, I concur.

Orders appealed from affirmed, and appeal dismissed with costs.

Lords' Journals March 28th, 1884.[1]

JOHNSTONE *v.* MILLING.

IN THE COURT OF APPEAL, JANUARY 13, 1886.

[*Reported in Law Reports*, 16 *Queen's Bench Division*, 460.]

APPEAL from the order of the Queen's Bench Division directing that judgment should be entered for the defendant on the counterclaim for damages to be ascertained by a reference.

The defendant in the action set up a counterclaim for damages for breach of a covenant contained in a lease by which the plaintiff covenanted with the defendant to rebuild the demised premises. The reply stated, among other things, that the plaintiff had not received any notice to rebuild from the defendant as required by the terms of the covenant, and also that the

[1] The concurring opinions of Lords Watson and Bramwell have been omitted.—ED.

lease was surrendered by the defendant before the time at which the obligation to rebuild would have arisen.

The action was, after issue joined, remitted to the county court for trial.

The facts with regard to the claim are immaterial to this report.

The facts with regard to the counterclaim appeared at the trial to be as follows: In June, 1881, premises, of which the plaintiff was owner subject to certain mortgages, were demised to the defendant by the plaintiff and his mortgagees for the term of twenty-one years from May 12th, 1880, subject to a proviso for sooner determination of the same, the rent being by the terms of the lease made payable to the plaintiff, until the mortgagees gave notice to the lessee in writing to pay it to them, and, upon such notice being given, to the mortgagees. The lease contained a covenant by the plaintiff that after the expiration of the first four years of the term the plaintiff would, on receipt from the lessee of six calendar months' notice in writing requiring him so to do, forthwith proceed to rebuild the premises within the period and in the manner specified by the covenant. It was provided that the lessee might at the end of the first four, seven, or fourteen years of the lease determine the same by giving to the person or persons for the time being in the receipt of the rent six calendar months' notice in writing of his intention so to do.

The defendant gave the requisite notice to determine the lease at the end of the first four years. He stated in evidence at the trial that during his tenancy he spoke to the plaintiff constantly about getting the money to rebuild the premises; that the plaintiff said he was unable to do so, but that he expected a loan society who had a second mortgage on the premises might advance money; that the plaintiff's declaration of inability to get the money for rebuilding extended over the last two years and a half of the defendant's tenancy; that he made it constantly in answer to the defendant's direct question, and at other times in conversation both before and after the expiration of the four years; and that it was in consequence of such declaration that he (the defendant) gave notice to determine the lease. The defendant further stated that he continued to occupy the premises for about three months after the determination of the lease paying rent to the mortgagees; that after the lapse of the lease the plaintiff came to him and voluntarily told him that he was utterly unable to find the money, but that he (the defendant) continued the tenancy on the chance of the plaintiff's getting the money.

The county court judge found that the plaintiff had been unable to find the money to rebuild the premises; that the plaintiff both before and after the surrender of the lease told the defendant that he was unable and would be unable to find the money for rebuilding the premises; that the defendant in consequence of the plaintiff stating that he was and would be unable to find the money for rebuilding the premises surrendered the lease, and that the defendant suffered damage by such surrender. The defendant's counsel submitted on those findings that the defendant was entitled to a verdict on the counterclaim.

The county court judge, however, held the contrary, and found a verdict both on the claim and on the counterclaim for the plaintiff, and entered judgment accordingly.

A rule *nisi* for a new trial was obtained by the defendant in the Queen's Bench Division, and the Divisional Court (Huddleston, B., and Cave, J.), upon the argument of the rule, made the order against which the plaintiff appealed.

Foote for the plaintiff.

Brooke Little for the defendant.

Lord Esher, M.R. The question before us arises entirely on the counterclaim. The claim therein set up is for damages for breach of a covenant in a lease whereby the landlord undertook to rebuild the premises upon notice. It is quite clear that there was no breach of the covenant in the ordinary sense of the term, because no notice to rebuild had been given, and the tenant had exercised the right given him by the lease of putting an end to the term at the expiration of the first four years, and consequently the lease was determined before the time at which the obligation to rebuild under the covenant would have accrued. The lease being so put an end to, it is quite clear that the lessee could not sue the lessor for breach of the covenant in not rebuilding after the expiration of the four years. That being so, the cause of action is thus shaped on behalf of the defendant. It is alleged that a breach of the contract was committed by the plaintiff before the end of the four years, inasmuch as he had declared that he was unable and would be unable to find the money for rebuilding when the time came. It is insisted that such declaration amounted to a declaration of his intention not to perform the contract, and was intended as a repudiation of it, or that, if it was not so intended, the expressions used by the plaintiff were such that the defendant was entitled to treat them as equivalent to a repudiation of the contract; and it is accordingly contended that there was a breach of the contract by anticipation before the time for its

performance arrived, for which the defendant was entitled to damages, and that the fact that the defendant afterward exercised his option of determining the lease is immaterial, for in so doing the defendant only acted for the benefit of the landlord in order to minimize the damages arising from his repudiation of the contract. The evidence shows, and the county court judge has found as a fact, that the lessor did a considerable time before the expiration of the four years, in answer to the questions of the lessee, repeatedly say that he was unable and would be unable to find the money for rebuilding, and the judge finds that in consequence the defendant surrendered the lease. It appears, however, from the evidence that he did not at once throw up the lease and give the premises into the hands of the plaintiff, but that he waited till the last six months of the four years and then gave the requisite notice to determine the term in accordance with the provisions of the lease. Upon these findings the county court judge decided that the defendant could not maintain his counterclaim. The case then went to the Divisional Court, which held that, either upon those findings, or on the inferences that ought to be drawn from them, the defendant had a right of action on the covenant, and therefore that the county court judge was wrong. Now on what principle can it be that the defendant had a right of action on the covenant? As I have said, it cannot be on the ground that there was a breach of the covenant in the ordinary sense of the term, because the defendant never gave any notice to rebuild, and he put an end to the term, so that the time when the covenant was to be performed never arrived. Accordingly the defendant has recourse to the doctrine laid down in several cases cited, the best known of which is perhaps the case of Hochster *v.* De la Tour.[1] In those cases the doctrine relied on has been expressed in various terms more or less accurately; but I think that in all of them the effect of the language used with regard to the doctrine of anticipatory breach of contract is that a renunciation of a contract, or, in other words, a total refusal to perform it by one party before the time for performance arrives, does not, by itself, amount to a breach of contract, but may be so acted upon and adopted by the other party as a rescission of the contract as to give an immediate right of action. When one party assumes to renounce the contract—that is, by anticipation refuses to perform it, he thereby, so far as he is concerned, declares his intention then and there to rescind the contract. Such a renunciation does not of course amount to a rescission of the contract, because one party to a

[1] 2 E. & B. 678; 22 L. J. (Q. B.) 455.

contract cannot by himself rescind it, but by wrongfully making such a renunciation of the contract he entitles the other party, if he pleases, to agree to the contract being put an end to, subject to the retention by him of his right to bring an action in respect of such wrongful rescission. The other party may adopt such renunciation of the contract by so acting upon it as in effect to declare that he too treats the contract as at an end, except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation. He cannot, however, himself proceed with the contract on the footing that it still exists for other purposes, and also treat such renunciation as an immediate breach. If he adopts the renunciation, the contract is at an end except for the purposes of the action for such wrongful renunciation ; if he does not wish to do so, he must wait for the arrival of the time when in the ordinary course a cause of action on the contract would arise. He must elect which course he will pursue. Such appears to me to be the only doctrine recognized by the law with regard to anticipatory breach of contract. We are asked, as it seems to me, by the counsel for the defendant to lay down a new principle, but I do not think we can do so consistently with the established doctrines of law on the subject. We have therefore to consider whether the defendant can bring his case within the doctrine as to anticipatory breach of contract as already laid down. The first question is whether the plaintiff intended to repudiate the contract when he made the statements relied upon with regard to his inability to find the money for rebuilding. Did he mean to say that, whatever happened, whether he came into money or not, his intention was not to rebuild the premises ? It does not seem to me that what he said naturally leads to the inference that such was his intention, and I think, having regard to the terms of his finding, that the county court judge declined to draw that inference. If he declined to do so, I think we ought not to do so, unless it is a necessary inference from what the plaintiff said. It does not appear to me that it is. If we ought not to draw that inference from what the plaintiff said, it seems to me to follow as a matter of course that the defendant was not entitled to draw it ; and the result is that the defendant fails in the very first point which it is necessary for him to establish—viz., that the plaintiff at the time when he made these declarations of his inability to find the money for rebuilding intended to repudiate his liability on the contract, or that he made use of expressions entitling the defendant to suppose that he did so. That being so, his case is gone ; but, assuming the contrary, then comes the question whether

the defendant elected to treat the plaintiff's statement as a wrongful repudiation of the contract. That involves, first of all, the question whether he could so treat it. The contract made between the plaintiff and the defendant was the whole lease. The covenant in question is a particular covenant in the lease not going to the whole consideration. If there were an actual breach of such a covenant at the time fixed for performance, such breach would not, according to the authorities, entitle the tenant to throw up his lease. That being so, I do not hesitate to say, though it is not necessary in this case to decide the point, that an anticipatory breach could not entitle him to do so, and that it does not appear to me that he could elect to rescind part of the contract. Therefore it seems to me that the defendant could not elect to put an end to the contract in consequence of what the plaintiff stated. But whether he could do so or not, it seems to me that in fact he did not. He did not renounce the lease or give up the premises. He did not do any act which affected the existence of the contract. He made no declaration of intention to treat it as rescinded except for the purpose of bringing his action upon it. On the contrary, at the time fixed by the contract he gave the requisite notice to determine the lease. I think, therefore, that on every point necessary to establish his counterclaim the defendant fails. For these reasons, with great deference to the Divisional Court, before whom these points do not appear to have been developed so clearly as they have been before us, I think their decision cannot be supported, and that the judgment of the county court judge was correct.

COTTON, L.J. In this case the defendant set up a counterclaim in respect of the alleged breach of a covenant in a lease of premises by the plaintiff to the defendant. The county court judge at the trial arrived at certain findings, upon which he gave judgment in favor of the plaintiff, but which in the opinion of the Divisional Court entitled the defendant to judgment. By the terms of the lease the obligation of the landlord on the covenant to rebuild the premises could not arise till after the expiration of four years, at which period, under the provisions of the lease, the lessee might, and in fact did, determine the term by six months' notice. Under these circumstances, if an action were brought against the landlord for breach of covenant in respect merely of his not rebuilding after the expiration of four years, it would be impossible to maintain that there was such a breach of covenant, for the covenant clearly is only to rebuild if the defendant continued tenant, and the defendant had himself put an end to the tenancy. But it is

said that, before the defendant gave the notice to determine the tenancy, and before the end of the four years, matters happened which were sufficient to entitle the defendant to maintain an action on the covenant to rebuild. The county court judge finds that both before and after the surrender of the lease (meaning, as I understand, by the term "surrender" the notice to determine the lease), the plaintiff told the defendant that he was unable and would be unable to find the money for rebuilding the premises. The Divisional Court thought that this declaration amounted to such a repudiation of the contract by the plaintiff before the time for performance had arrived as to entitle the defendant in accordance with the doctrine laid down in the case of Hochster *v.* De la Tour[1] to bring an action for breach of the contract. That doctrine seems to be that, where a party to a contract has made statements before the time for performance has arrived importing a refusal to perform or be bound by the contract, the other party, if he chooses, may elect to act upon such statements as a renunciation of the entire contract, and may thereupon treat the same as a breach of the contract and bring his action. If he so elects, his election relieves the other party from any further obligation under the contract and enables both parties to make arrangements for the future on the footing that the contract has been once for all broken and is at an end. The law is thus stated by Cockburn, C.J., in the case of Frost *v.* Knight:[2] "The law with reference to a contract to be performed at a future time, where the party bound to performance announces prior to the time his intention not to perform it, as established by the cases of Hochster *v.* De la Tour[3] and Danube & Black Sea Co. *v.* Xenos[4] on the one hand, and Avery *v.* Bowden,[5] Reid *v.* Hoskins,[6] and Barwick *v.* Buba,[7] on the other, may be thus stated. The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all the obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which

[1] 2 E. & B. 678; 22 L. J. (Q. B.) 455.
[2] Law Rep. 7 Ex. 111.
[3] 2 E. & B. 678; 22 L. J. (Q. B.) 455.
[4] 13 C. B. (N. S.) 825; 31 L. J. (C. P.) 284.
[5] 5 E. & B. 714; 26 L. J. (Q. B.) 3.
[6] 6 E. & B. 953; 26 L. J. (Q. B.) 5.
[7] 2 C. B. (N. S.) 563; 26 L. J. (C. P.) 280.

would justify him in declining to complete it; on the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss." That expression of the law was cited with approval by Keating, J., in the case of Roper *v.* Johnson.[1] It must be taken therefore that the law is that, when one party has done an act which amounts to a wrongful renunciation of the contract, and the other has acted upon it as such, there is a cause of action in respect thereof, but when the other has not done so, then both the parties, as well he who has attempted to renounce the contract as he who asserts its existence, are entitled to the benefit of its provisions.

The Divisional Court in the present case treated the statements made by the plaintiff as a renunciation of the contract within the doctrine I have mentioned. I cannot say I think they were right in so doing. But assuming that they were, I can find no case which shows that the doctrine in question applies to the renunciation of one particular covenant or stipulation in a contract such as a lease, which contains many. And as at present advised, I am not favorably impressed with the view that the doctrine would apply to the case of a lease where the tenant cannot, in consequence of the refusal by the landlord to perform a particular covenant, put an end to the entire contract. But however that may be, we have first to arrive at the conclusion that there was a renunciation of the contract. If the county court judge had found that there was such a renunciation, it might have been necessary to decide the other questions as to the effect of it, but all that is stated in the finding is that the plaintiff said that he was and would be unable to find the money for rebuilding. Whether such a statement amounted to a renunciation of the contract must depend on the circumstances of the case and the nature of the contract. Here the plaintiff, though not a moneyed man, was the owner of the property included in the lease subject to mortgages, and there might be, and seems to have been, some expectation on his part of getting the money for the purpose of rebuilding advanced on the property by the mortgagees. It seems to me that it would be a reasonable construction of his statements that they rather meant that he was afraid, and was under the impression

[1] Law Rep. 8 C. P. 167.

that he would not be able to get the money than that he did not intend to perform the contract even if he could get it. The county court judge does not find that he renounced the contract, and, that being so, we ought not, I think, to put that construction on what he said. The evidence, as appearing on the judge's notes, seems to me rather contrary to that construction, because it would seem from the defendant's own evidence that he did not himself so understand the plaintiff's statements, for he says that he continued the tenancy after the lease expired on the chance of the plaintiff's getting the money. The defendant appears to have thought it on the whole the best course to act on the contract and not to treat it as at an end, but to give notice under it to determine the lease before the time arrived at which the plaintiff's obligation to rebuild was to arise. It seems to me, therefore, that there was nothing amounting to a renunciation of the contract by the plaintiff, and that, if there were, the defendant did not adopt it but treated the contract as still existing. For these reason I think the decision of the Divisional Court was wrong.

BOWEN, L.J. I am of the same opinion. The question which we have to decide arises with regard to the defendant's counterclaim. The claim made by the defendant is upon a covenant by which the plaintiff undertook, after the expiration of four years from the commencement of the term, to rebuild the premises upon notice from the defendant to do so. The defendant says that before the time had arrived for the performance by the plaintiff of this obligation he repudiated his liability on the contract, and so conferred an immediate right of action on the defendant. We have, therefore, to consider upon what principles and under what circumstances it must be held that a promisee, who finds himself confronted with a declaration of intention by the promisor not to carry out the contract when the time for performance arrives, may treat the contract as broken, and sue for the breach thereof. It would seem on principle that the declaration of such intention by the promisor is not in itself and unless acted on by the promisee a breach of the contract ; and that it only becomes a breach when it is converted by force of what follows it into a wrongful renunciation of the contract. Its real operation appears to be to give the promisee the right of electing either to treat the declaration as *brutum fulmen*, and holding fast to the contract to wait till the time for its performance has arrived, or to act upon it, and treat it as a final assertion by the promisor that he is no longer bound by the contract, and a wrongful renunciation of the contractual relation into which he has entered. But such declara-

tion only becomes a wrongful act if the promisee elects to treat it as such. If he does so elect, it becomes a breach of contract, and he can recover upon it as such. Upon looking to the reason of the thing it seems obvious that in the latter case the rights of the parties under the contract must be regarded as culminating at the time of the wrongful renunciation of the contract, which must then be regarded as ceasing to exist except for the purpose of the promisee's maintaining his action upon it; it would be unjust and inconsistent with all fairness that the promisee should be entitled to bring his action as upon a wrongful renunciation of the contract, and yet to treat the contract as still open and existing with regard to the future. Such being the reason of the thing, the authorities seem all to be the same way. In Hochster *v.* De la Tour,[1] Lord Campbell thus expresses the doctrine: "But it is surely much more rational and more for the benefit of both parties that, after the renunciation of the agreement by the defendant, the plaintiff should be at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damage he has suffered from the breach of it." In the passage cited by my Brother Cotton from Frost *v.* Knight,[2] Cockburn, C.J., points out that there are these two alternatives open to the promisee, and that it is a condition essential to his right to sue upon a repudiation of the contract before the time for performance as upon a breach that he should thenceforth treat the contract as at an end except for the purpose of being sued upon. Such being the doctrine on the subject, the question arises whether it is applicable to the case of a lease. It has been decided in Surplice *v.* Farnsworth[3] that a tenant could not throw up his tenancy on the breach of a stipulation that the landlord should put the premises in repair. No one ever yet heard of an attempt to put an end to a lease in respect of a breach of covenant except in cases where the term was made dependent upon the performance of the covenant as a condition. No case has been cited in which it has been sought to apply the doctrine of Hochster *v.* De la Tour[4] to such a case as this, or to any case where the promisee sought to keep open the contract after the alleged repudiation by the promisor, and also to sue for damages for such repudiation as for a breach. It is not necessary to decide the point, but I very much doubt whether the doctrine of Hochster *v.* De la Tour[5] is applicable in such a case as this between lessor and lessee. Apart, however, from this question, I think that the Court below were wrong with

[1] 2 E. & B. 678; 22 L. J. (Q. B.) 455. [2] Law Rep. 7 Ex. 111.
[3] 7 M. & G. 576. [4] 2 E. & B. 678; 22 L. J. (Q. B.) 455. [5] *Ibid.*

regard to the inferences of fact which they drew. The claim being for wrongful repudiation of the contract, it was necessary that the plaintiff's language should amount to a declaration of intention not to carry out the contract, or that it should be such that the defendant was justified in inferring from it such intention. We must construe the language used by the light of the contract and the circumstances of the case in order to see whether there was in this case any such renunciation of the contract. It seems to me that the county court judge was of the contrary opinion, and, looking to the whole history of the transaction, I cannot say that he was wrong. Unless the language of the plaintiff can only reasonably be construed as importing such renunciation, I think the Court below ought not to have disregarded the finding, and treated what the plaintiff said as amounting to a renunciation of the contract within the doctrine to which I have alluded. Further, assuming that there was evidence to support a finding that what the plaintiff said was a renunciation of the contract, there does not seem to me to be a tittle of evidence to show that the defendant ever elected to treat it as such, and all reason and authority, as I have said, appear to me to show that he must so elect to treat it, in order that it may constitute a breach of the contract. It appears to me, therefore, that the case for the defendant entirely fails. For these reasons I think that the appeal should be allowed.

Appeal allowed.

HARBER BROTHERS COMPANY *v.* THE MOFFAT CYCLE COMPANY.

IN THE SUPREME COURT OF ILLINOIS, JUNE 16, 1894.

[*Reported in* 151 *Illinois Reports* 84.]

APPEAL from the Appellate Court for the Third District; heard in that Court on appeal from the Circuit Court of McLean County; the Hon. Thomas F. Tipton, J., presiding.

Lillard & Williams for the appellant.

E. A. De Mange for the appellee.

PER CURIAM. This was a suit in *assumpsit*, brought by the Harber Brothers Company against the Moffat Cycle Company, to recover damages for breaches of a contract for the sale and delivery of personal property. The defendant pleaded *non-assumpsit* and set-off, and on trial before the Court, without a

jury, the issues were found for the defendant, and its damages under its plea of set-off were assessed at $1059.26, and for that sum and costs the defendant had judgment. On Appeal to the Appellate Court the judgment was affirmed, and by a further appeal the judgment is now brought to this Court. In deciding the case, the Appellate Court delivered the following opinion :

" Pleasants, J. In this case the facts are substantially agreed on, and the question on the record is single, and purely one of law.

" Appellee was an Illinois corporation, engaged in the manufacture of bicycles at Chicago, and appellant, also an Illinois corporation engaged in selling bicycles and other machines at Bloomington.

" On December 8th, 1891, the parties entered into a written contract, of which it is unnecessary to say more than that by it appellee agreed, among other things, to deliver to appellant on the cars at Chicago 300 Moffat safety bicycles, of 1892 pattern, shipments to commence in January then next, and made thereafter in quantities and at times as appellant should specify, and paid for by his acceptances at thirty days.

" Appellant ordered one machine the day before the contract was made, and on the 31st of the same month 24 ; from time to time, in February, 1892, 46 ; in March, 113 ; in April, 67, and in May, 19—in all 270. Most of these orders were for single machines, to be shipped to different points directly to parties respectively to whom appellant had made sales ; some for two or three, and the few for large numbers to appellant at Bloomington.

" In partial compliance with these orders, appellee shipped in February, 2 ; in March, 9 ; in April, 19 ; in May, 56 ; in June, 16, and in July, 3—in all 105.

" The evidence showed, and it was admitted, that appellant did not give its acceptance for all of those shipped, but from the time the first was received until this suit was brought, was constantly in arrears for more or less of them. This arrearage was purposely and persistently withheld, on the ground that appellee was first in default, and that the damage to appellant, by reason of the delays and shortness of shipments, always exceeded it. The correspondence between the parties, which is in the record, consists largely of mutual complaints for disregard of their contract obligations. Appellant was insisting on prompt and full compliance with its orders ; and appellee, claiming it was doing all it could, and increasing its facilities for doing more than before in that direction, and insisting on prompt and full acceptances for what were shipped. Neither

justified or attempted to excuse its own delinquency on the ground of the other's until as hereinafter stated. As early as March 15th appellant wrote to appellee that they were receiving countermands from their customers, because of the failure to ship machines to them as ordered, and saying : ' Machines we must have or sustain a loss, and you know what that means.' But the first notice taken of appellee's complaint of neglect to send acceptances that we find in the correspondence abstracted, is in appellant's letter of April 19th, in answer to appellee's of the 12th, enclosing draft, dated March 29th, for acceptance to cover shipments up to that date, for $675.04, in which it says : ' You can hardly expect us to take up the matter of your account and make settlement of it in the condition that things are now. We want some very satisfactory proof that you can take care of us during and at the close of the season if we do so.'

" To this letter appellee replied on the 21st, admitting that it had not been able to perform as promised in regard to shipments, but expressing surprise, for reasons stated, at the position taken by appellant, and saying : ' We must insist that you let us have your acceptance by return post, and we in turn will do our best toward filling your orders.'

" On the 26th appellant, reviewing the course of their dealings, wrote : ' Now if you expect us to sign acceptances promptly, then you must expect to do something for us. If you do not show a disposition immediately to give us goods, and in large quantities, this letter is but a forerunner of what you will receive.' To which appellee replied on the 27th : ' I am in receipt of your favor of the 26th, which covers a good deal of ground that we have already gone over, and which convinces me further of the issue your company is leading up to. We shall hold further shipments until we receive an acceptance or cash for all the wheels we have shipped you up to date.'

" Notwithstanding further acceptances, but not in full, and further orders, filled only in part and with delay, these mutual complaints and demands continued until July 18th, when appellee, by letter of that date, among other things, notified appellant, that unless payment should be made for the goods shipped and not paid for, and the other matters of difference arranged within five days, it would terminate appellant's agency for the sale of its wheels in the territory referred to, and fill orders from such territory itself. On the 23d, appellant, in reply to one from appellee on the 21st, not abstracted, wrote, among other things : ' . . . We do not intend to pay you another cent until there is an adjustment of our claim for damages ; ' and on the 27th brought this suit.

"It was in *assumpsit*, on four special counts upon the contract, with the common counts added. The cause of action set forth in each of the special counts was defendant's breach of the written contract by unreasonable delay in the shipment of the 105 bicycles shipped, and failure to ship the other 165 ordered. The third and fourth, added by leave of the Court, alleged special damages, by reason of defendant's alleged knowledge that plaintiff bought to resell, and that its profits would be $50 upon each machine resold, and that plaintiff had incurred and would incur a large expense in preparing to resell and in reselling.

"Defendant pleaded the general issue, and set-off in the common counts, and two other pleas, setting off damages by failure of defendant to give acceptances, to which demurrers were sustained. But it was afterward stipulated 'that all evidence that would be competent under any issue well pleaded should be considered as though the declaration or pleas or replications were filed, making such issues or averments.'

"The cause was tried by the Court without a jury. Appellant admitted that it had withheld acceptances and was in arrears for the 105 wheels actually shipped and received, to the amount of $1647.96, as a partial indemnity against the damages it claimed to have suffered, but showed in reduction of this sum an account of $588.70 for repairs of defects in them. The Court allowed this account, and rendered judgment for the defendant for the difference, $1059.26, disallowing plaintiff's claim for damages. Exceptions were duly taken by plaintiff to this judgment, and from it this appeal is prosecuted.

"The question then is, could appellant, having failed to comply with its contract as to payment for machines actually received, accepted, and disposed of by it, with full knowledge of the breach by appellee as to time of delivery and number delivered, maintain an action, on the contract, for such breach.

"We have no doubt that this contract, though one, was severable, embracing independent obligations of the parties as to delivery on the one part and payment on the other, under the several orders for machines given by appellant, the principal difference between which and an entire contract is, that either party to one of the former kind having fully performed as to any independent agreement, may maintain an action thereon for its breach by the other without averring or proving performance, or its equivalent, on his part as to all; but subject to defendant's right to *recoup* for his failure as to others, in respect of which he is himself not in default.

"And on general principles either party to a contract,

whether entire or severable, may recover as on an implied agreement for a partial performance which has been voluntarily accepted by the other with full knowledge of the breach ; but subject also to the latter's right to *recoup* for the failure to fully perform the express contract.

" Appellant here is not seeking damages as on an implied agreement, nor by way of recoupment, but by action on the express contract ; and we understand it to be an elementary and inflexible rule in such case, that it must aver and prove it is not itself in default as to the agreement for the breach of which by appellee it brings the suit.

" The proposition for which it contends, as stated in the argument, is, ' that where the vendor has not delivered all the goods contracted for, and the vendee has not paid for all he has received, the damages of vendee and purchase price due the vendor will be set off or recouped, and a judgment rendered for vendor or vendee for the balance due the one or the other, as the case may be.'

" For application here, this statement seems to concede what the evidence also seems to prove, that neither party had complied, literally or substantially, with the terms of its agreement. As to the machines delayed, that of defendant was that they should not be delayed, and that of plaintiff, that for all it accepted, though delayed, it would pay in the manner prescribed, as if they had not been delayed. At and from the very beginning of their dealings these agreements were violated by each respectively, and by the plaintiff wilfully. For the machines ordered but not delivered, as well as for those delivered and accepted, but not paid for, it finally declared its intention, deliberately, in writing, not to pay one cent, except upon a precedent condition not imposed by the agreement, the performance of which it had the power to delay, if not practically to prevent.

" We think these facts disprove the averment in the declaration of plaintiff's readiness to receive and pay for the goods according to the agreement.

" The parties then being alike in default, how can either maintain an action upon the contract for its breach by the other ? What hinders the application of the rule in such case that *potior est conditio defendentis ?*

" It is said the proposition contended for is supported by a line of decisions of which thirteen are cited as examples. Seven are stated generally or quoted from, and are, therefore, presumably the strongest in appellant's favor. An examination of these and several of the others fails to discover that either of

them goes farther than is above stated, as familiar law relating to entire and severable contracts, the right of recovery for partial performance and of diminution or extinguishment of plaintiff's claim by recoupment. Neither seems to touch the pivotal point in this case—namely, the right of a party to recover, as plaintiff, for the breach of an agreement, entire or independent, which he has himself, without legal excuse, failed to perform substantially in full.

"The one most confidently relied on, as containing every element of the case at bar, and the only one in which, as here, the vendee was plaintiff, is that of Corcoran *v.* The Lehigh Coal Co., 138 Ill. 390. In that case the agreement, made August 20th, 1886, was that the company would deliver to him, at his dock, 12,000 tons of coal—grate, small egg, stove, and chestnut—at stated prices per ton for each kind, and an additional amount, at his option, and its own dock, on other terms also stated. No time was fixed for delivery, but since plaintiff was a coal dealer, presumably it was intended to be from time to time as he should order to meet the demands of his trade. The terms for the 12,000 tons were: 'We will take your paper at three months, with 6 per cent interest, and will renew the same when it becomes due, to accommodate you, but you are to pay the same as fast as you can.' He was also to give a satisfactory guarantee.

"When delivery was first made, or first refused, or when the suit was commenced, does not appear. Nor, in view of the total price, what it had paid, the credit given and privilege of removal, do we think it certainly appears that plaintiff was ever in default as to the agreement on his part; though from the finding of a balance against him, on defendants' plea of set-off, which was not only for goods sold and delivered, but also for money found due on settlement, it may be inferred that he had either failed to give his paper for the coal received, or had failed to pay it at maturity before he brought the suit. If he gave it according to the agreement, the failure to pay it would not be a breach of the agreement.

"But whichever may be the facts, the question here involved was not presented by counsel nor considered by the Court. There is no allusion to any such question in the opinion. It seems to have been assumed and conceded that plaintiff was in condition to recover upon the contract if defendant had broken it. He claimed damages for a failure to deliver according to the agreement for 12,000 tons and also according to the option clause. The Supreme Court say the principal controversy on the trial was as to the latter, 'not as to his legal right to such

damages under the contract, but whether or not, as a matter of fact, the defendant had failed to furnish him coal as required, and whether he was damaged thereby.' The trial judge refused all the instructions asked and gave a series prepared by himself.

"Of these the first told the jury it was admitted that defendant failed to furnish 4279 of the 12,000 tons, and that plaintiff's damages were $1 per ton, which they should allow him, with interest at 6 per cent from November 30th, 1886, making $5134.70 under the agreement. The second related to the claim for the damages under the option clause. It appeared that the jury allowed him the amount stated by the judge, but nothing under the option clause, and found a balance for defendant for coal delivered, which included a large amount for delivery, at the higher prices fixed by that clause. The Appellate Court held the option clause illegal and void, and refused to consider the evidence on that branch of the case, but affirmed the judgment. In the Supreme Court, according to the opinion, the appellee (defendant) contended it was void, and the Court say, 'Counsel for appellant acquiesced in the view that said clause is void, but insist that it must be taken together with the contract for 12,000 tons of coal, thereby rendering it void also: therefore they say, while appellant could recover no damages for the failure to furnish him coal at appellee's dock, neither can appellee recover the price fixed by that contract for coal actually delivered. That position cannot be maintained.' The Court then proceed to show that the option clause could not have formed any part of the consideration for the agreement as to the 12,000 tons, and, therefore, though illegal, could not have affected the validity of that agreement; and that upon that theory the judgment was not correct. They hold that appellee could not escape liability under that clause, upon the ground of its illegality, and at the same time under it recover, as by the judgment he did, the price of the coal furnished; and further find that there was nothing whatever in the record to warrant the assumption, in the first instruction, of an admission that plaintiff's damage for the failure to deliver under the 12,000 ton contract was $1 per ton. For those reasons, and those only, so far as appears, they reversed the judgment. In the report of the case we do not find a word indicating that counsel on either side, or the Court supposed that the question here presented was involved. It was not decided, expressly or by implication.

"The question here distinctly presented as the controlling one, is whether a vendee who has accepted goods delivered

under an express contract, but not at the time or in the quantity required by it, with knowledge of the default of the vendor in those respects, but has himself failed, without legal excuse, to pay for them according to it, can maintain an action on the contract for such a default of the vendor. We think the general rule, everywhere recognized, is against it, and has been specifically so applied in analogous cases in Illinois. Pennsylvania Coal Co. *v.* Ryan, 107 Ill. 226; Bradley *v.* King, 44 Ill. 339; Stewart *v.* Many, 7 Ill. App. 517.

"For appellant the attempt is made to evade the force of these decisions, by the claim that appellee was first in default, whereby appellant was damaged to an amount exceeding the price of the goods received, for which he failed to pay, and from that time, until the suit was brought, always had a just claim for damages by appellee's default exceeding the amount for which appellant was in arrears for machines delivered to and accepted by it. In other words, the price of the machines accepted and damages for delay in the delivery of them and for the non-delivery of others considered, appellant being judge, it never really did owe anything for what it accepted more than it paid for when due and in the manner prescribed by the agreements, and, therefore, was not bound to give the acceptances it withheld. But the question is not whether upon a fair settlement, offsetting damages against price, appellant really owed anything, but whether, accepting the machines under contract, it performed that contract on its part as to payment.

"A like attempt under the circumstances was made in the case of Bradley *v.* King, *supra*. There, by contract made in February, the vendor agreed to deliver 1,000,000 feet of lumber by September 1st then next. By that time there was delivered only about 218,000 feet. By the 29th nearly 600,000 feet more was delivered, the last cargo—about 175,000 feet—being delivered on or near that day. The vendee accepted it, but refused to pay for it, and brought the suit for damages for failure to deliver according to the terms of the contract. Defendant pleaded the refusal to pay for the last cargo, and on demurrer the plea was held good. The Court held that though delayed, its acceptance bound the vendee to pay for it as if it had been delivered within the required time, and the refusal excused further delivery; and say that 'if plaintiffs sought, at the time of the delivery of the last cargo, to pay for it by setting off their damages, it was incumbent on them to have made a distinct offer so to do to the defendants. In order to defeat the effect of this plea, they should either have traversed the averment of refusal to pay, and proved, on the trial of the issue,

that damages were due them equal to the value of the cargo, and that they offered to the defendants to release the damages to that amount, or they might have replied these facts specially to the plea. But the plea, on demurrer, should have been held good.'

"Such an offer, if the damages proved were equal to the value of the cargo, would have been equivalent to performance. But performance, or its equivalent, or a legal excuse for non-performance, must be averred and proved. In this case there was no such averment or proof. Plaintiff received invoice after invoice of machines accepted, without paying, as it was bound by the agreement, or offering to pay by offsetting damages or intimating that it would claim damages on settlement. Even after such intimation, if made in its letters of April 19th and 26th, it was substantially withdrawn by those immediately following. The next one shown in the abstract, under date of May 27th, reads thus: 'Gentlemen, herewith find note for $1434.46, which is to apply on our account, and which will cover invoice as per statement attached. There are possibly a few shipments made since the 25th inst. that will not appear on this statement. They will be settled for as soon as the wheels are received and checked in. You will understand that when shipments are made by freight there is a few days' delay at each end, and sometimes our office force is crowded and the bills are not checked in promptly.' This shows payment in part in the same manner prescribed by the contract, and a clear promise to pay the balance, if any, in the same manner, and not by offsetting any claim for damages, when the wheels should be received and checked in; June 2d it requested appellee to cancel all orders it had not filled, not on account of its claim for damages, but because of 'the continued rains and bad roads throughout the entire country,' causing a falling off of its orders for bicycles, and the cancellation of many it had received, and adding: 'We believe this will be but temporary, as it certainly cannot rain all summer, and if it fairs up soon there will be a big demand; still we do not want to load up at this time.' June 16th it wrote: 'We hand you herewith our paper to the amount of $814.42, to cover items as per enclosed statement of account. Please receipt and return statement, and oblige.'

"June 23d it made some complaint of defects in wheels lately received, but not a word about a claim for damages, and the next is that of July 23d, announcing its intention not to pay another cent until there should be an adjustment of its claim, as hereinabove stated. These five letters are all of appellant's

that are abstracted, from the date of the first to that of the last. During all this time it was wilfully withholding its acceptances for machines received, and was in arrears when it brought the suit. They had been received on the terms of the contract as to payment, which was to be made on delivery. Appellant refused to comply with those terms. It, therefore, could not maintain an action on the contract for the delay in shipment of the machines received, and by the refusal of the vendors were excused from further delivery. Appellee was not bound to go on delivering, without receiving a cent in payment until appellant's claim for damages, known to be contested, should be adjusted to its satisfaction.

"Nor do we see how it could take advantage of appellee's default, even if it were here seeking to do so by way of set-off or recoupment. Set-off is a counterclaim, as to which the defendant is plaintiff, and must establish his right as upon a distinct action; and, therefore, if for breach of contract, must show he is not himself in default as to the agreement, whether entire or severable, on which he bases his claim, which in this case it seems appellant could not do. And the same obstacle would stand in the way of recoupment. For though recoupment, considered as a right, enables a delinquent defendant, conceding to the plaintiff a cause of action, to prevent a recovery or reduce its amount, it is not upon any merit of his own, but for the fault of the plaintiff in connection with the same transaction on which he sues. The burden of proving such fault rests upon him, and is the same it would be if he were plaintiff suing for the damages caused by it; and hence, if that fault consists in the breach of another agreement, independent of the one on which plaintiff sues, but contained in the same instrument and relating to the same subject-matter, he must show, in like manner, that he is not himself in default as to that agreement. Hedstrom *v.* Baker, 13 Ill. App. 104, and authorities there cited; Mendel *v.* Fink, 8 Ill. 378. The principle is that neither party can, by any means, obtain the aid of a court to enforce in his favor a contract, which, without legal excuse, he has substantially failed to perform on his part.

"It is not pretended that appellant made, or offered to make, any case under the common counts, and for the reasons here stated we are of opinion it could not recover on the contract."

We are disposed to concur with the Appellate Court in the reasoning and conclusions of its opinion filed in this case. The judgment of that Court will be affirmed.

Judgment affirmed.

SECTION IV.—UNCONDITIONAL CONTRACTS.

WARE *v.* CHAPPELL.

IN THE UPPER BENCH, MICHAELMAS TERM, 1649.

[*Reported in Styles* 186.]

WARE brought an action of debt for 500 against Chappell upon an indenture of covenants between them—viz., that Ware should raise 500 soldiers, and bring them to such a post, and that Chappell should find shipping and victuals for them to transport them to Galicia ; and for not providing the shipping and victuals at the time appointed was the action brought. The defendant pleaded that the plaintiff had not raised the soldiers at that time, and to this plea the plaintiff demurs. Windham of counsel with the plaintiff, held that the defendant ought to have provided the shipping and victuals against the time, though the soldiers were not raised, for the not raising of the soldiers can be only urged by way of mitigation of damages, and not pleaded in discharge of the breach assigned. Yard of counsel with the defendant, held the plea was good in bar of the action, for the covenants of each part have relation one to the other, and there is a condition precedent made by the words to find shipping for the soldiers, so that the defendant was not to find shipping, except the plaintiff raised the soldiers, neither is there any notice given as how many soldiers he had raised. Roll, C.J., held that there was no condition precedent, but that they are distinct and mutual covenants, and that there may be several actions brought for them, and it is not necessary to give notice of the number of the men raised, for the number is known to be 500, and the time for the shipping to be ready is also known by the covenants ; and you have your remedy against him if he raise not the men, as he hath against you for not providing the shipping. Herman and Nicholas, JJ., held against Roll, that there is a precedent condition. Ask, J., was of Roll, the Chief Justice's opinion. Nicholas changed his opinion, and so judgment was given for the plaintiff, except better matter were shown.

NORTHRUP *v.* NORTHRUP.

IN THE SUPREME COURT OF NEW YORK, AUGUST, 1826.

[*Reported in* 6 *Cowen* 296.]

ON demurrer to the defendant's plea. The plaintiff declared on a covenant which, on oyer, was as follows: The defendant covenanted to pay certain rent due and in arrear to one D. Tomlinson, on a certain farm, and all which should become due on March 25th, 1825, the whole to be paid on that day; and the plaintiff covenanted that on the defendant's so paying the rent, he, the plaintiff, would give up and discharge a certain bond and mortgage. The action was for not paying the rent at the day.

Plea that the plaintiff did not, on March 25th, 1824, give up and discharge the bond and mortgage, nor tender, nor offer to do so, on that day, or before or since.

General demurrer and joinder.

M. T. Reynolds in support of the demurrer.

A. L. Jordan, *contra*, cited Parker *v.* Parmele, 20 John. 130, and the cases there referred to.

SAVAGE, C.J. The plea is bad. The payment of the money to Tomlinson on the day specified is clearly a condition precedent. The performance by the plaintiff of his part of the agreement is not necessarily simultaneous, but was naturally to be subsequent. A general averment of his readiness to perform is all that can be necessary or proper. To aver a tender was certainly not necessary.

Lord Mansfield in Jones *v.* Barkley, Doug. 690, makes three classes of covenants: 1. Such as are mutual and independent, where separate actions lie for breaches on either side. 2. Covenants which are conditions, and dependent on each other, in which the performance of one depends on the prior performance of the other. 3. Covenants which are mutual conditions to be performed at the same time, as to which the party who would maintain an action must, in general, offer or tender performance. I consider the plaintiff's covenant as clearly belonging to the second class. The defendant's covenant was absolute. The cases cited by the defendant's counsel relate to the third class.

The plaintiff must have judgment, with leave to the defendant to amend on payment of costs.

Judgment for the plaintiff.

TERRY AND ANOTHER *v.* DUNTZE, BART.

IN THE COMMON PLEAS, FEBRUARY 4, 1795.

[*Reported in* 2 *Henry Blackstone* 389.]

THIS was an action of debt, and the declaration stated, that by certain articles of agreement made on March 25th, 1789, between Sir George Yonge, Bart., the said Sir John Duntze (the defendant), one Henry Reed, and one Thomas Southcomb and the plaintiffs, the said plaintiffs in consideration of the sum of £3800, to be paid as hereinafter mentioned, did jointly and severally covenant with the said Sir George Yonge, Sir John Duntze, Henry Reed, and Thomas Southcomb, and each of them, that the said plaintiffs, or one of them would at their own proper costs and charges finding all materials whatsoever, and with the best materials of every kind, and in a good substantial and workmanlike manner, build, erect, and finish a certain building for a manufactory at Ottery Saint Mary, in the county of Devon, according to certain drawings and plans, and would erect the said building, according to such rules, and in such manner, as by the particulars thereof thereunder written were mentioned and specified. And also that the said building, including the wheat case, to be adjoining or within the same, should be in every respect finished and completed, on or before September 29th then next. In consideration whereof they, the said Sir George Yonge, Sir John Duntze, Henry Reed, and Thomas Southcomb, covenanted to pay the £3800 in the following manner—that is to say, the sum of £1266 13*s.* 4*d.* as soon as the second floor should be laid, the further sum of £1266 13*s.* 4*d.* as soon as the fourth floor should be laid, and the remaining sum of £1266 13*s.* 4*d.* as soon as the whole building should be covered in, and fully finished and completed, and the same building should be surveyed and approved of by such persons as should be by the said Sir George Yonge, Sir John Duntze, Henry Reed, and Thomas Southcomb, or either of them, appointed to examine the same, for that purpose, within one month after the same should be so as aforesaid finished and completed. And the said Sir George Yonge, Sir John Duntze, Henry Reed, and Thomas Southcomb did, and each of them did also agree, to advance and pay unto the workmen and laborers employed by the said plaintiffs in erecting the said building, such sum or sums of money weekly as might be necessary for their weekly wages or subsistence, the same to be de-

ducted and allowed out of the instalment portion or share of the said £3800 which should be by them next paid, according to the covenant and agreement aforesaid, relating thereto ; and also to pay unto the said plaintiffs at the time of paying the last of the three several sums of £1266 13*s.* 4*d.* in manner hereinbefore mentioned, the further sum of £150 for freight and carriage of materials, travelling expenses for workmen and laborers, and all other incidental charges, not included in the particulars thereunder written ; provided always, and it was thereby also agreed between the said parties thereto, and each and every of them jointly and severally, that if the foundation should not prove good, so as that it should be necessary to put in sleepers, or a greater depth of brick work than was described in the plans annexed, and the particular thereunder written, then the said plaintiffs should be paid in addition to the several sums above mentioned as extraordinary work, but in a reasonable proportion, according to the extent of such extraordinary work ; provided also, that neither such extraordinary work, nor any other variation which might be agreed on in the course of the carrying on the building, should make void that agreement, but the same should be binding and valid, notwithstanding such variation or extraordinary work as aforesaid, and the same should be allowed for or deducted, at a proportionable estimate to the whole of the contract money, etc. It was then averred that the plaintiffs, after making the articles and before exhibiting their bill, did at their own proper costs and charges, finding all materials whatsoever, and with the best materials of every kind, and in a good, substantial, and workmanlike manner build, erect, and finish the said building in the said articles of agreement mentioned, and so thereby agreed to be erected and built, for a manufactory as aforesaid, together with such wheat case as aforesaid, according to the said drawings, sections, and plans delineated in the two several papers thereunto annexed as aforesaid, and also according to such rules and in such manner as by the particular thereof thereunder written, were and are mentioned and specified as aforesaid, except as is hereinafter mentioned ; and that the said building, including such wheat case aforesaid, would have been in every respect finished and completed by them, the said plaintiffs, on or before September 29th next, after the making of the said articles of agreement, according to the tenor and effect of the said articles ; but the said plaintiffs further said that in erecting and building the said manufactory and wheat case, they, the said plaintiffs, by the direction, and at the special instance and request of the said Sir George Yonge, Sir John Duntze, Henry Reed, and Thomas

Southcomb, made and caused to be made divers alterations and variations therein, and in many respects deviated from the said drawings, sections, plans, particulars, and rules in the said articles of agreement mentioned, and were thereby, and in consequence thereof, and without any neglect or default of the said plaintiffs not only hindered and prevented from finishing and completing the same, upon or before the said September 29th next after the making of the said articles of agreement, but also forced and obliged to do and perform certain extraordinary work, in and about the said building and wheat case, over and besides what was originally designed and stipulated for as aforesaid. It was then averred that a surveyor was appointed, who surveyed and approved of the building and the extraordinary work, etc., and that the plaintiffs reasonably deserved to have the sum of £7059 1*s.* 9¼*d.*, exclusive of the sum of £150 as a further allowance for divers expenses not included in the particular written under the articles of agreement, according to the estimate of the surveyor, etc., and the breach assigned was the non-payment of any of the sums of money in the articles of agreement specified, etc.

There were also counts for work and labor, money paid, and on an account stated.

To the first count there was a general demurrer, and to the others *nil debet* was pleaded.

Le Blanc, in support of the demurrer, argued that as the plaintiffs had positively agreed to complete the buildings on or before September 29th, it was necessary to show that they were completed on or before that day. The excuse which is alleged —namely, that they made alterations deviating from the plan, by the direction of the defendant, and were therefore prevented from finishing the buildings within the time, is not tantamount to a performance. The original undertaking was by deed, and cannot be dispensed with by the simple agreement of the parties. Thus if a bond be conditioned to perform an award, provided the arbitrator make his award on or before a certain day, and afterward both parties agree that the time shall be enlarged, yet unless the award be made within the time mentioned in the condition the bond is void. Brown *v.* Goodman, 3 Term Rep. B. R. 592 ; *in notis*, Little *v.* Holland, 3 Term Rep. B. R. 590.

The counsel on the other side was stopped by

BULLER, J.[1] The only question in this case is whether the covenants were dependent, and whether the completing the buildings was a precedent condition. Now it is a rule long established in the construction of covenants, that if any money

[1] Absent the Lord Chief Justice.

is to be paid before the thing is done, the covenants are mutual and independent. It is accordingly laid down by Lord Holt in Thorpe *v.* Thorpe,[1] that "if a day be appointed for payment of the money, and the day is to happen before the thing can be performed, an action may be brought for the money before the thing be done, for it appears the party relied upon his remedy, and intended not to make the performance a condition precedent;" and he cites the year book 48 Ed. 3, 2, 3; 7 Co. 10*b*; Ughtred's Case, 1 Ventr. 147, and 1 Saund. 319. The case in the year book, 48 Ed. 3, 2, 3, is inaccurately stated by Lord Coke in Ughtred's Case to be, "that Sir Ralph Tolcelser covenanted with Sir Richard Pool to serve him with three esquires of arms in the war with France, and Sir Richard covenanted therefore to pay him 42 marks, and that each party had equal remedy, one for the service, and the other for the money." But it appears in the year book, that the covenant was that half the money was to be paid in England before they went to France, the principle therefore of that case agrees with the doctrine of Lord Holt in Thorpe *v.* Thorpe, as is observed by him, 12 Mod. 461. So also in Pordage *v.* Cole, 1 Saund. 319, where there was an agreement by the defendant to give a certain sum to the plaintiff for his lands and house, etc., to be paid at a fixed period, and only 5*s.* of the purchase-money was advanced at the time of making the agreement, an action on the agreement was holden to lie for the residue, amounting to £774 15*s.* without showing that he had either made or tendered a conveyance of the lands. Now let us apply this principle to the present case. The plaintiffs covenant to finish and complete the buildings on or before September 29th then next, in consideration of which the defendant covenants to pay £3800 by instalments—viz., a certain sum when the second floor should be laid, a further sum when the fourth floor should be laid, and the remainder of the money when the whole should be covered in and finished. By the terms of the contract then two several sums of money were to be paid before the thing to be done was done. The plaintiffs therefore were clearly entitled to their action for the money without averring performance, and the defendant to his remedy on the covenants.

HEATH and ROOKE, JJ., of the same opinion.

Judgment for the plaintiffs.

[1] 1 Salk. 170; 1 Lord Raym. 662; Comyn's Rep. 98, and more at length 12 Mod. 455.

CAMPBELL *v.* JONES.

IN THE KING'S BENCH, FEBRUARY 9, 1796.

[*Reported in* 6 *Term Reports* 570.]

THIS was an action of covenant, contained in an indenture dated February 25th, 1793, made between the plaintiff and the defendant. It recited that the plaintiff had obtained a patent for fourteen years from November 28th, 1792, for his invention of an improved method of destroying and taking away all the carbonic, oleaginous and coloring elements and particles in linen, cotton, hemp, and in all colored rags and other materials used in making paper; and that the defendant, who then carried on the trade or business of a paper manufacturer, was desirous of bleaching and preparing the materials for making paper according to the improved method used by the plaintiff, and as set forth in the specification, etc.; that it had been agreed between the plaintiff and the defendant that in consideration of the sum of £500 to be paid by the defendant to the plaintiff in manner thereinafter mentioned, he, the plaintiff, should teach and instruct the defendant in the bleaching and preparing of all materials for making paper according to the said specification and improved method of the plaintiff, and should also permit and suffer the defendant during the continuance of the patent to bleach, etc., the materials for making paper according to the specification, etc., to the extent only and subject to such restrictions, provisos and agreements as were and are thereinbefore mentioned, expressed, declared, and contained. That in pursuance of the agreement and for and in consideration of the sum of £250 to the plaintiff paid by the said defendant, and of the further sum of £250 covenanted to be paid by the defendant to the plaintiff in manner thereinafter mentioned, and in consideration of the covenants and agreements of the defendant thereinafter contained, the plaintiff covenanted that he would to the best of his skill and with all possible expedition teach and instruct the defendant in the manner and method of bleaching, etc., linen and other materials used in making paper according to the direction of the specification, etc., and according to the method which he then used, or any improved method which he should or might thereafter use in bleaching, etc. That the defendant, in consideration of the plaintiff's covenants, covenanted that he would on or before February 25th, 1794, or sooner, in case the plaintiff

should before that time have sufficiently taught and instructed him in bleaching and preparing the materials for making paper, etc., pay to the plaintiff the further sum of £250. It then set forth a breach of covenant by the defendant in not paying the said further sum of £250 on or before February 25th, 1794, or at any time afterward.

To this declaration there was a special demurrer, and these causes were assigned, that it appears by the declaration that the plaintiff had covenanted to teach and instruct the defendant in the manner and method of bleaching, etc., used in making paper in the manner set forth in and by the covenant stated in the declaration, and that the defendant in consideration thereof covenanted to pay to the plaintiff the said sum of £250, the breach of which covenant is alleged as the cause of action in the declaration, and yet it is not averred in the declaration that the plaintiff had taught and instructed the defendant in the manner and method of bleaching, etc., used in making paper according to the specification or in any other manner, etc.

This case was argued in last Michaelmas Term by Shepherd in support of the demurrer and by Lawes against it. The former referred to these cases: Kingston *v.* Preston, cited in Dougl. 688; Duke of St. Albans *v.* Shore, 1 H. Bl. Rep. C. B. 270; Hotham *v.* The East India Company, *ante*, 1, vol. 638, and Goodison *v.* Nunn, *ante* 4, vol. 761. The latter cited these authorities: Martindale *v.* Fisher, 1 Wils. 88; Boone *v.* Eyre, 2 Bl. Rep. 1312, and 1 H. Bl. Rep. C. B. 273, note *a*; Callonel *v.* Briggs, Salk. 112; Thorpe *v.* Thorpe, Salk. 171; first point; Jones *v.* Barclay, Dougl. 684; Bach *v.* Owen, *ante* 5, vol. 409, and 2 Saund. 156.

The Court took time to consider of this case, and now their opinion was delivered, as follows, by

Lord Kenyon, C.J. (after stating the case). In support of this demurrer it was said that the plaintiff's teaching the defendant his method of bleaching the materials used in making paper was a condition precedent to the plaintiff's right to demand payment of the last sum of £250; on the other hand, it was insisted that they were mutual and independent covenants. Whether these kinds of covenants be or be not independent of each other must certainly depend on the good sense of the case. If one thing is to be done by a plaintiff before his right of action accrues on the defendant's covenant, it should be averred in the declaration that that thing was done. "Where there are mutual promises, yet if one thing be the consideration of the other, there a performance is necessary to be averred unless a day is appointed for performance." Per Holt, C.J., Salk.

113. "If a day be appointed for the payment of the money, and the day is to happen before the thing can be performed, an action may be brought for the payment of the money before the thing be done." Salk. 171. Upon the authority of these cases the judgment of the Court must be in favor of the plaintiff, if upon the true construction of the deed a certain day be fixed for the payment of the money, and the thing to be done may not happen until after. The plaintiff in this case covenants with all possible expedition, not by any fixed time, to instruct the defendant in bleaching linen, etc., and in consideration of the plaintiff's covenants "the defendant covenants that he will on or before February 25th or sooner, in case the plaintiff should before that time have instructed the defendant, pay him the further sum of £250. To support the construction contended for by the defendant this covenant must be understood as if it had been written thus, "And the said Griffiths, the defendant, doth hereby covenant that he will on or before the 25th February, in case the plaintiff shall before that time have instructed him, and sooner in case the plaintiff shall before that time have instructed him, pay the further sum of £250;" which is in effect covenanting to pay the money as soon as the plaintiff shall have instructed him. Now had this been the intention of the parties, the natural and obvious way of expressing such intent would have been for the defendant to covenant to pay as soon as he should be taught; but if the design of the parties were that the plaintiff at all events should be paid on February 25th, and sooner in case the defendant should be sooner instructed, the expression here used is a natural expression, and the words "in case the said Hector, the plaintiff, should before that time have instructed the said Griffiths," the defendant will be confined to the word sooner. The intent of the parties appears to be that the payment might be accelerated, but should not in any event be delayed.

But another ground on which the plaintiff is entitled to judgment is this, that the teaching of the defendant is not the whole consideration of the covenant to pay. The agreement of the parties is that in consideration of one entire sum of £500 the plaintiff should teach and instruct the defendant in the art of bleaching materials for making paper and permit him during the period of his patent to bleach such materials according to his specification; and though this sum is divided into two sums of £250 each, and is to be paid at different times, no part is denominated to be the consideration of using the patent, nor any part as the consideration of teaching, but one integral sum is adapted to the whole. Under this agreement the defendant

has a perfect title to use the patent, and the instruction of the defendant cannot be taken to be the most material part of the consideration, as the specification must be supposed to contain full instruction for that purpose, though some advantage might arise from the assistance of the inventor. In the case of Boone *v.* Eyre, E. 17 Geo. 3, Lord Mansfield said : " The distinction is clear, where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, but where the covenants go only to a part, and where a recompense may be had in damages, it is a different thing." And Ashhurst, J., added : " There is a difference between executed and executory covenants ; here the covenants are executed in part, and the defendant ought not to keep the estate because the plaintiff has not a title to a few negroes." So here the covenant to teach is but part of the consideration of the £500, for not doing which the defendant may recover a recompense in damages. And the agreement of the plaintiff having been executed in part by transferring to the defendant a right to exercise his patent, he ought not to keep that right without paying the remainder of the consideration, because he may have sustained some damage by the plaintiff's not having instructed him.

For these reasons we are all of opinion that judgment must be for the plaintiff.

WILKS *v.* SMITH.

IN THE EXCHEQUER, JUNE 17, 1842.

[*Reported in* 10 *Meeson & Welsby* 355.]

ASSUMPSIT. The declaration stated that theretofore, to wit, on, etc., by a certain agreement then made between the plaintiff of the one part, and the defendant of the other part, the plaintiff agreed to sell, and the defendant agreed to purchase, a lot of building ground, situate, etc., and which said lot of land the plaintiff agreed to sell, with all the rights and privileges thereto belonging, for the sum of £120, which sum the defendant agreed to pay to the plaintiff in manner following— that is to say, on or before the expiration of four years from the day of the date of the said agreement, with lawful interest at 5 per cent, half-yearly, until paid. The declaration then alleged mutual promises, and averred, that four years from the day of the date of the said agreement had not yet expired, and

that the said sum of £120 had not yet been paid ; and that after the making of the said agreement, and before the commencement of this suit, to wit, etc., a large sum of money, to wit, the sum of £12, for two years' interest on the said sum of £120, became and was due and payable from the defendant to the plaintiff under and by virtue of the said agreement. Breach, in non-payment of the £12.

General demurrer, and joinder in demurrer.

The defendant's point was, that the first count of the declaration is insufficient, because it does not aver or show that the plaintiff had any title to the ground in that count mentioned or that there was any ability, or readiness, or willingness on the part of the plaintiff to perform his part of the agreement.

The points marked for argument on the part of the plaintiff were, that it was unnecessary to aver or show title to the ground, or a readiness or willingness on his part to perform the agreement, as neither was a condition precedent to his right to recover the interest, which the defendant by his demurrer admits to have accrued due under the agreement. The plaintiff will also contend, that as a day is appointed for payment of the interest, and no time mentioned for performance of that which is the consideration for the interest, it was unnecessary to aver performance, and that the defendant's remedy is by cross-action, if any breach of the agreement has been committed by the plaintiff ; and the plaintiff will also contend that it must be presumed he has performed his part of the agreement, and that, if not, the defendant should have pleaded the non-performance.

Warren in support of the demurrer.

J. W. Smith, contra.

PARKE, B. I am of opinion that the declaration is good, and that it was not necessary for the plaintiff to aver his readiness and willingness to convey at every period of the contract. It is enough if he is ready and able to convey at the time when the title is to be made out. I also think that it is no objection that he has not averred that he had a title to the land. According to the terms of the agreement, no time is fixed for the sale ; but a time is limited within which the principal money is to be paid, with interest in the meantime. The consideration for the defendant's paying the interest is the plaintiff's undertaking to sell the land, not the actual sale of it. The plaintiff is not bound to do anything before the money is paid. The rule, as laid down in the notes to Pordage *v.* Cole, applies strictly to this case. No time, then, being fixed by the agreement for the conveyance of the land, it cannot be a condition precedent ; nor can we imply that a conveyance was intended to be made

before the interest was paid, else we should be supposing that the plaintiff intended to part with his estate before the money was paid, and such an intention certainly cannot be implied from the nature of the contract. It may be that no conveyance need be made till the principal money is paid—that is, at the end of four years. The question here is whether or not interest is to be paid before the plaintiff has given up possession of the land. I think it is, and that the conveyance is not a condition precedent. The plaintiff is therefore entitled to our judgment.

ALDERSON, B. I am of the same opinion. If one act is to be done in consideration of another, the party suing for the non-performance must aver performance on his part. But if there be two acts, one fixed in point of time, and the other not, the latter is not a condition precedent. Here the defendant relied not upon the plaintiff's performance, but upon his promise to perform.

ROLFE, B. The case of Luxton *v.* Robinson, cited by Warren, is distinguishable from this case, because there possession was to be delivered to the defendant on a given day. But here there is no such obligation to deliver possession. No such intention appears on the face of the contract ; and if we were to hold, that possession was to be given by the plaintiff, our decision would be at variance with the meaning of the parties. The vendor was not to convey the estate before he got the purchase-money.

Judgment for the plaintiff.

BEECHER *v.* CONRADT.

IN THE COURT OF APPEALS OF NEW YORK, SEPTEMBER TERM, 1855.

[*Reported in* 13 *New York Reports* 108.]

ACTION commenced in the Supreme Court, in 1851, to recover the amount agreed to be paid by the defendant in and by the contract hereinafter mentioned. The complaint alleged the making of the contract ; that it had been duly transferred to the plaintiff ; that the party of the first part to the contract and the plaintiff had always fulfilled and kept all things therein contained on their part to be performed ; that the defendant had neglected to pay the amount agreed to be paid by him, and that the whole amount of the principal and interest, named in

the contract, was due and unpaid, and judgment for this amount was demanded. The answer put all the allegations of the complaint in issue. The cause was tried at the Oneida County Circuit, held by Gridley, J. The plaintiff read in evidence the contract mentioned in the complaint. It was dated January 3d, 1839, and executed by Abraham Varick, as surviving executor of the will of one Walker, deceased, as party of the first part, and by the defendant as party of the second part. By the terms of this contract the party of the first part, in consideration of one cent to him paid, and "upon the express condition that the party of the second part shall, and do well and faithfully perform the covenants hereinafter mentioned, and to be performed on his part," covenanted for himself and his assigns to execute and deliver to the party of the second part a deed of conveyance in fee, containing covenants of warranty against the acts of the grantor, of and for a parcel of land which was described in the contract; and the defendant, the party of the second part, covenanted to pay to the party of the first part or his assigns "the sum of three hundred and ninety-six dollars in five equal annual payments, with interest annually on all sums unpaid." The plaintiff further proved that the land mentioned in the contract was conveyed, and the contract assigned to him in December, 1850, and rested. Thereupon the counsel for the defendant moved the Court to nonsuit the plaintiff, on the ground, among others, that inasmuch as the action was brought to recover the whole amount of the purchase-money, after the same had become due by the contract, the plaintiff could not recover without proving that he tendered a conveyance of the land, or offered to convey the same to the defendant before the commencement of the action. The Court overruled the objection, refused to nonsuit the plaintiff, and decided that he was entitled to recover the amount of the purchase-money mentioned in the contract. The counsel for the defendant excepted. The judgment, rendered at the circuit, was affirmed by the Supreme Court at a general term, held in the fifth district. The defendant appealed to this Court.

Samuel Beardsley for the appellant.

Charles A. Mann for the respondent.

GARDINER, C.J. The plaintiff has neither averred nor was there proof of any other breach of the contract upon the part of the defendant, except the non-payment of the purchase-money. The plaintiff had a right to sue for each instalment as they severally became payable; but this right he has waived, and now seeks to recover the whole purchase-money in this action, without an averment or proof of a tender of a convey-

ance, or a readiness or willingness to convey. It is not denied by the Court below, that if the several payments had been made as they fell due, and the suit had been commenced for the last instalment alone, that the plaintiff must have made such an averment and sustained it by proof, if questioned ; the point is too plain to admit of discussion. It is, however, said that a right of action accrued as the instalments became payable, which the non-performance of the plaintiff would not discharge. This doctrine assumes a right, upon the part of the plaintiff, to divide his cause of action into as many suits as there were instalments. The first answer to this suggestion is, that the consideration for the conveyance by the vendor was an entire sum, to be paid by instalments ; that the whole was due at the commencement of the action, and the plaintiff has sued for the whole purchase-money without attempting to distinguish, in his complaint or evidence, between the different instalments. The second answer is, that the plaintiff having elected to wait until the fifth and last instalment became due, and upon the payment of which, as this case stands, the defendant would be entitled to a deed, cannot now sustain his action for either instalments, without proof of performance or readiness to perform on his part. The covenants, as to the four first instalments, were originally independent ; but the plaintiff, by his omission to insist upon a strict performance by the defendant, has lost the right to bring more than one suit for the money, which formed the consideration for his conveyance. The defendant, by a tender of the whole, which he has now a right to pay, would be entitled to his deed. The plaintiff, on the other hand, must establish his right to the consideration as an entirety, or he cannot recover anything. If he recovered in this action but $50, the judgment would be a complete bar to any further claim for the purchase-money, and when that judgment was paid the defendant would be entitled to his deed.

The defendant could not protect himself against an action by an offer to pay the first, or all of the four first instalments ; as the consideration was entire, and all due, the plaintiff could insist upon the whole. And yet, if because the covenants were originally independent they must always continue so, the defendant must have the right to discharge by payments what the plaintiff could enforce by action.

The truth is, the parties, by lapse of time, are in the same situation as though the purchase-money was all payable at one time. The defendant has lost his right to pay the instalments separately, and the plaintiff his right to enforce collection by separate suits. There is but a single cause of action, one and

indivisible. The defendant, if he would obtain his deed, must pay all ; and the plaintiff, if he would recover, must show such a performance on his part as would entitle him to all the unpaid consideration. The condition attaches to the whole debt and every part of it. The judgment of the Supreme Court should be reversed, and a new trial ordered.

DENIO, JOHNSON, MARVIN, and DEAN, JJ., concurred.

CRIPPEN, J. (Dissenting.) The first and fifth grounds on which the motion for a nonsuit was asked may properly be resolved into one and considered together, as they both present the same identical question. If the plaintiff was bound to prove the tender of a deed, or an offer to give such a deed to the defendant as the contract called for, prior to bringing his action to recover the purchase-money, then he failed to maintain the action, and the Court in that event erred in refusing the nonsuit. In order to determine this question, it will be necessary to refer with care to the terms of the agreement between Varick, the trustee, and the defendant. By this contract Varick agreed to convey lot No. 3, in Walker's patent, on the condition of a full and faithful performance of all the covenants contained in the contract to be performed by the defendant. On the part of the defendant, the first covenant made by him was that he would pay the trustee, Mr. Varick, his heirs or assigns, the just and full sum of $396 in five equal annual payments, with interest annually on all sums unpaid. The contract bears date on January 3d, 1839 ; consequently, the last annual payment became due on January 3d, 1844. This covenant of the defendant is not made to depend on any contingency or act of the other party, or of any condition to be found in the contract. When, then, let us inquire, did the defendant become entitled to the deed of said premises ? The parties, by the plain language of the contract, have said that the defendant shall be entitled to such deed on the express condition that he shall pay the sum of $396, in five equal annual payments from January 3d, 1839, with annual interest. It is not easy to mistake the meaning of parties when they use language so plain and emphatic in making their contracts.

The defendant, most clearly, was not entitled to a deed when the first, second, third, or fourth instalments became due, even if they had been punctually paid by him. So also in relation to the last instalment, the time for its payment was fixed by the agreement ; when the time arrived the money became due and payable from the defendant. No act was agreed to be performed on the part of the trustee or the plaintiff as assignee of the contract, in order to entitle him to the money due on the

last payment. The premises were to be conveyed on the express condition of the payment of the whole amount of the purchase-money.

No act whatever was agreed to be done by the trustee to entitle him to the money; or, in other words, the defendant agreed that he had no right to call for a conveyance except upon the express condition that he paid the whole amount of the purchase-money. The case is clearly distinguishable from that of Grant *v.* Johnson, 1 Selden, 247. In that case the contract did not require the defendant to pay the whole amount of the purchase-money before obtaining a deed. He was entitled, by the terms of the agreement, to receive both the possession of the premises and a deed thereof before he could be called upon for the payment of the instalment in controversy in that action. Not so in the case at bar, and in this particular the cases are manifestly and clearly different. The defendant in this action had no right to ask for a deed, except upon the express condition that he first paid the full amount of the purchase-money. I have not been able to find any adjudged case conflicting with the plaintiff's right to recover, in this action, the amount due upon the contract.

The judgment should be affirmed.

HAND, J. (Dissenting.) I am of the opinion that the covenants to pay the purchase-money and to convey the land are independent. The defendant agreed to pay the purchase-money, and at certain specified times; and the vendor agreed to convey "upon the express condition" that he did so. No suit was commenced until all of the purchase-money became due. But that circumstance did not make the covenants dependent which before were independent. Where the last payment and the conveyance are to be simultaneous acts, and the prior payments have not been made, in a suit for the purchase-money, a performance, or an offer to perform, is necessary. Johnson *v.* Wygant, 11 Wend. 48; Grant *v.* John, 1 Seld. 247. But that is not this case as I understand this contract. The payment of all the purchase-money was a condition precedent to the right of the defendant to demand a conveyance. Having covenanted absolutely to pay certain sums at the expiration of certain fixed periods, and the vendor having promised a deed on condition that the payments were made, the clear intention of the parties must have been that payment of all the money should precede the conveyance. There was no duty for the vendor to perform until the vendee had performed all the covenants on his part. By inserting the word "condition" or *sub conditione*, a condition is created. 10 Co. 42*a*; 2 Bac. Abr.,

Condition (A); Platt on Cov. 72. "Upon condition" is an expression from which a condition precedent usually arises. Platt on Cov., *supra*. The agreement here was not merely to convey "upon" payment being made, but "upon the express condition" that the vendee should perform; while the covenant to pay is without condition. And besides, the meaning of the words "upon condition" has been settled by construction, which should not be disturbed.

For this reason I think the judgment should be affirmed.

Judgment reversed.

CHARLES H. EDDY ET AL., APPELLANTS, *v.* ALVIN DAVIS, RESPONDENT.

IN THE COURT OF APPEALS OF NEW YORK, OCTOBER 8, 1889.

[*Reported in* 116 *New York Reports* 247.]

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made May 4th, 1886, which reversed a judgment in favor of plaintiffs, entered upon a decision of the Court on trial at Special Term and granted a new trial.

The action was brought to recover from defendant unpaid instalments alleged to be due upon a contract to purchase land.

By the contract, which was executed March 1st, 1875, plaintiff agreed to sell to defendant a lot of land in the village of Westport, upon which there was a brick store, for the sum of $1600, payable in annual instalments varying from $100 to $200.

The contract provided that possession should be given on payment of the first instalment, and contained the following provisions: "The party of the second part (defendant) is to have one hundred feet depth of land including the store running east and west, running north and south the width of the store." "The said parties of the first part agree that on receiving the sum of eight hundred dollars at the time and manner above mentioned, that they will execute and deliver to the said party of the second part, at their own proper cost and expense, a good and sufficient deed of said property by the party of the second part giving to the parties of the first part a bond and mortgage on said property for the remaining sum unpaid." "And the said party of the first part agrees to keep open a right of way back of said building." "It is understood that the party of the second part is to put up during the coming

year a building on the east end of said store, to cost not less than six hundred dollars."

Defendant paid the first instalment under the contract, entered into possession, and erected the building called for by the contract. He made other payments in amount about sufficient to pay the interest on the purchase-money. At the time of the commencement of the action two instalments, amounting to $300, were not due. At the time the agreement was made the plaintiffs owned other property adjoining the lot sold defendant, on the north, and bounded on the west by the principal street of the village; and over this property access could be had from the street to the rear of defendant's lot.

In June, 1875, plaintiffs sold to one Joseph Hutchings all the rest of the property owned by them, without any reservation of a right of way to defendant's lot, and at the time of the commencement of this action they owned no property over which they could give a right of way to the rear of defendant's store.

Further facts appear in the opinion.

Richard L. Hand for appellants.

Chester McLaughlin for respondent.

BROWN, J. The trial court found, as conclusions of law, that the defendant "was not entitled to a conveyance of property, or of such right of way until the full sum of $1600, the consideration provided by said contract, was paid, and that the provision in said contract for deeding the premises to the defendant, upon the payment of $800 and interest, was for his (defendant's) benefit, and he could avail himself of it at his option, by paying such money at the times provided in the contract, and demanding a deed and tendering a bond and mortgage; not having paid or made such demand or tender, and having waived his right to make any claim under this provision, as appears in the sixth finding of fact, the contract was to be treated as if it had been omitted, and the action having been brought to recover instalments due, no tender of a deed by the plaintiffs was necessary to enable them to maintain this action."

The sixth finding of fact referred to was as follows: "That immediately before the commencement of this action the plaintiffs, by their attorneys, applied to said defendant and informed him that plaintiffs were ready and willing to perform said contract on their part, if he was ready to pay, to which defendant replied that he could not pay, and said he wanted to give up the property, and thereupon plaintiffs commenced this action."

It is undisputed that within two months after the defendant entered into possession of the property plaintiffs sold all their adjoining land, and thus put it out of their power to comply

with their agreement with defendant, and keep open a right of way to the rear of his store; and at the time of the offer mentioned in the finding of fact I have quoted the plaintiffs were powerless to fulfil their agreement. The finding, therefore, that they were ready to perform, or that their offer and defendant's refusal constituted a waiver of tender of the deed cannot be sustained. A tender imports not only readiness and ability to perform, but actual production of the thing to be delivered. The formal requisite of a tender may be waived, but to establish a waiver there must be an existing capacity to perform. Nelson *v.* Plimpton Elevating Co., 55 N. Y. 484; Lawrence *v.* Miller, 86 N. Y. 173; Bigler *v.* Morgan, 77 N. Y. 318.

Here there was no existing capacity, as, having sold all the adjacent lands, plaintiffs could not perform their covenant "to keep open a right of way" back of defendant's store. The conclusion of a waiver is not, therefore, sustained. If, however, the construction put upon the contract by the learned trial court, in the conclusion of law I have quoted, is correct, then the finding of a waiver of tender of performance is unimportant.

Never having paid $800 of the purchase-money, defendant was not in a position to demand the conveyance, and there being in the contract, as construed by the trial court, no covenant on the part of the plaintiff to deliver the deed until the full consideration was paid, tender of the conveyance as a condition precedent to recover for unpaid instalments was not necessary, and no question as to the sufficiency of the facts to constitute a waiver of tender could legitimately arise.

Where a contract for the sale of land provides for partial payments of the purchase-money prior to the delivery of the deed, the vendor may sue for such instalments when due without tendering a conveyance. Paine *v.* Brown, 37 N. Y. 228; Harrington *v.* Higgins, 17 Wend. 376.

But when, after the instalments are all due, the vendor brings an action for the purchase-money, he is not entitled to recover without proving an offer before suit to convey the land to the defendant on receiving the purchase-price. When the last instalment falls due the payment of the whole of the unpaid purchase-money and the conveyance of the land become dependent acts. Beecher *v.* Conradt, 13 N. Y. 108.

And the same rule applies when an action is brought for any instalment payable at or after the term fixed for the delivery of the deed. Grant *v.* Johnson, 5 N. Y. 247; Pordage *v.* Cole, 1 Saund. 320*b*, Williams's note. So that if the fair interpretation of the contract is, as was held by the trial court, that there was no obligation on plaintiffs' part to deliver a deed until the

whole of the purchase-money was paid, except in case of a demand therefor by defendant after payment of $800 and tender of a bond and mortgage for the balance of the purchase-price, then the judgment was right and must be affirmed.

We come, therefore, to the consideration of the question whether the learned trial judge was right in his construction of the contract that the provision for a delivery of the deed, when $800 was paid, was one for the benefit of the defendant, enforceable only on his demand, or whether it was a covenant on the part of the plaintiffs to deliver the conveyance at the time named.

We can find no support for the construction adopted by the trial court in the agreement itself, and it is not based upon any finding of fact.

The construction is harsh, unfair, and unnecessary. The parties appear to have provided expressly for all matters between them. We expect naturally to find mutual obligations in the contract. The vendee agrees to pay the purchase-money, and we look for an agreement on the part of the vendor to convey. If it is not contained in the clause of the contract under discussion, it does not exist in express terms, and we are forced to imply it from the nature of the instrument.

In Robb *v.* Montgomery, 20 Johns. 15, cited by appellants, there was an express covenant to convey on payment of the purchase-money, and a further provision that if, after the first payment was made, defendant wished to get a deed, and to give a bond and mortgage for securing the two last payments, plaintiff would give a deed.

Thus the intent of the parties was clear that it was to be optional with the vendee whether he would take a deed on making the first payment.

Here there is no express covenant to give a deed at all, unless it is in the provision cited. The language used in this part of the contract does not express an option, but is that of a positive undertaking. It is: "Parties of the first part agree, on receiving the sum of eight hundred dollars, . . . that they will execute and deliver . . . a sufficient deed."

We think the intent of the parties is plainly inferable from the language used, that this was a covenant on plaintiff's part to convey at the time and under the circumstances mentioned.

We have, therefore, an action to recover unpaid instalments brought after the time stipulated for the delivery of the deed, and in such case, to entitle plaintiffs to recover, it was incumbent upon them to show an offer made before suit, to convey on receiving the stipulated part of the purchase-money.

Grant *v.* Johnson and Beecher *v.* Conradt, *supra*. The facts of this case are very similar to the cases cited. In Grant *v.* Johnson the contract was to sell the land for $950 ; $200 of which was payable in April, 1846, and $200 in April, 1847, and the balance in two annual payments thereafter.

The seller was to give possession in November, 1845, and a deed in May, 1846. The action was for the instalment due in April, 1847, and this Court held that delivery of the deed was a condition precedent to the payment of the second instalment, and having made no tender, plaintiff could not recover.

In Beecher *v.* Conradt the purchase-money was payable in five instalments. None were paid, and after they were all due plaintiff brought an action for the whole purchase-money. This Court held that while the covenants as to the first four instalments were originally independent, when the last instalment fell due, conveyance and payment were dependent acts, and that no part of the purchase-money could be recovered without tender of a conveyance before commencement of the action. To the same effect are Hoag *v.* Parr, 13 Hun, 95 ; James *v.* Burchell, 82 N. Y. 108 ; Smith *v.* McCluskey, 45 Barb. 621. The determination of the question what are and what are not dependent covenants is not one free from difficulty, and many of the cases are so irreconcilable that they are studied with little profit or assistance to the judgment.

Each case must be determined by the cardinal rule of interpreting all contracts—viz., to ascertain the intention of the parties to the agreement ; and here we think there is no doubt the intention was to deliver the deed of the property when $800 of the purchase-money was paid. For all the instalments falling due prior to that time plaintiffs might have brought their action and recovered without proof of offer to convey, but having waited until after the time fixed for the delivery of the deed, payment and conveyance became dependent and concurrent acts, and tender of performance was essential on their part to an enforcement of defendant's obligations under the contract. The case seems to fall directly within the spirit of the second rule suggested by Williams in his note to Pordage *v.* Cole, *supra* : "When a day is appointed for the payment of money, and the day is to happen after the thing which is the consideration is to be performed, no action for the money can be sustained without averring a performance ;" and the rights of the parties under such circumstances as exist in this case are clearly stated by Gardner, J., in Beecher *v.* Conradt as follows : "The defendant has lost his right to pay the instalments separately, and the plaintiff his right to enforce collection by sepa-

rate suits. There is but a single cause of action, one and indivisible. The defendant, if he would obtain his due, must pay all, and the plaintiff, if he would recover, must show such a performance on his part as would entitle him to all the unpaid consideration." None of the cases cited by the appellant are in conflict with the rule stated, under the construction we have given the contract.

Robb *v.* Montgomery, 20 Johns. 15, in one respect, I think, must be erroneously reported. The case states that the declaration averred non-payment of all the instalments.

If we are to understand by this that the action was brought to recover the whole purchase-money, and to regard the Court as holding that no tender of conveyance was necessary, then the case is in conflict with all the later authorities. But if the action was to recover the first instalment only, then the decision is intelligible. I think the action must have been for the first instalment. The case as reported arose upon a demurrer by defendant to a replication to a plea in the answer and involved the single question whether the assignment of the contract and the conveyance of the land to Bemus by the vendor, before the first instalment was due (Bemus being ready and willing and having the capacity to convey to defendant), was a bar to the recovery. The Court held that it was not, and in so deciding is in harmony with later decisions, which hold that in an action by a vendor for an instalment of purchase-money falling due prior to the time limited for the delivery of the deed, want of title in the vendor is not a defence. Harrington *v.* Higgins, 17 Wend. 376.

These and all kindred cases will be found, I think, to have arisen on independent covenants in contracts, and the rule established by them has no application in an action by a vendor for purchase-money brought subsequent to the day stipulated for the delivery of the deed.

The appellant makes the point that the agreement to keep open the right of way was a personal covenant, having no relation to the title, and its violation furnished no excuse for refusal to pay the purchase-money.

The appellant is not in a position to raise such a question, being concluded by the finding of the trial court, that such right of way was necessary to the proper enjoyment of the store, and that the parties intended that defendant should have such way, and that it should be conveyed to him with the store ; and we think a right of way, which the trial judge found to constitute in value one half of the property agreed to be sold, cannot be regarded as an immaterial part of the consideration

of the defendant's obligation. Having put it out of their power to convey the property which they had agreed to sell, the plaintiffs were not able to make a valid offer of performance, and hence not entitled to recover the unpaid purchase-money.

The order of the General Term was right and should be affirmed, and judgment absolute rendered for the defendant on the stipulation, with costs.

All concur.

Order affirmed and judgment accordingly.

MATTOCK, Executor of SOUTHWOOD, *v.* KINGLAKE.

In the Queen's Bench, April 26, 1839.

[*Reported in* 10 *Adolphus & Ellis* 50.]

Debt by the plaintiff as executor of one Southwood. The declaration stated that defendant was seized in fee of certain premises by virtue of a bargain and sale enrolled, dated February 19th, 1822, by which the Bishop of Winchester had bargained and sold the same to Southwood in fee to such uses as he (Southwood) by deed or instrument in writing, with or without power of revocation and new appointment, sealed and delivered by him in the presence of, and attested by, one or more credible witness, should from time to time, or at any time, appoint of and concerning the same ; and in default of such appointment to the use of defendant in fee, in trust for Southwood, his heirs and assigns forever. That defendant being so seized, it was afterward agreed by and between Southwood and defendant, at defendant's request, that Southwood should convey to defendant all his estate and interest in the premises ; that thereupon by articles of agreement, sealed and delivered by Southwood in the presence of a credible witness, and made between Southwood and defendant, Southwood agreed to sell and defendant to purchase the said premises for the sum thereinafter mentioned ; and defendant thereby for himself and his heirs, covenanted with Southwood, his heirs and assigns, to pay to him or them, on or before February 19th, 1825, as the consideration for such sale and purchase, the sum of £11,206, with interest at 5 per cent, payable half yearly, to the time of the completion of the purchase, Southwood allowing thereout the same rate of interest for so much of the purchase-money as had been, or might be, paid to him in the meanwhile ; and defendant thereby also agreed to pay for the conveyance and stamp duty. Averment, that Southwood, in his lifetime, was

always ready and willing to perform his part of the agreement, and did in fact offer to execute a conveyance to defendant of all his estate and interest in the premises, whereof defendant had notice ; and that defendant had been ever since the agreement in possession of all the premises, and in receipt of the profits to his own use ; yet defendant did not, nor would, pay or cause to be paid to Southwood, in his lifetime, the said sum and interest for the same on or before the said February 19th, 1825, although the purchase, by and through the default of defendant, had not been completed before that day ; and although Southwood was living on and after that day ; nor had defendant, since the death of Southwood, paid the same to plaintiff, executor as aforesaid ; but, on the contrary, a large sum, to wit, etc., for principal and interest, parcel of the above sum, was still due and unpaid, the rest having been satisfied, whereby an action accrued, etc.

Plea, that Southwood did not at any time tender to defendant any conveyance of the premises so agreed to be sold by him to defendant, or of any part thereof. Verification. General demurrer and joinder.

Bere in support of the demurrer.

Manning, *contra*.

Lord Denman, C.J. None of the circumstances relied upon by Manning are sufficient to show that the acts of payment and conveyance here were to be concurrent, or to distinguish this case from Pordage *v.* Cole[1] and the authorities cited in the note to it. If, as is contended on the part of the plaintiff, the legal and equitable estates are now united in the defendant, he requires no remedy against the plaintiff which he has not already in his own hands. If not, we cannot help him to a remedy which he has not secured for himself by his contract.

Littledale, J. A time being fixed for payment, and none for doing that which was the consideration for the payment, an action lies for the purchase-money without averring performance of the consideration. An action for not executing a conveyance of the premises might have been maintained by the defendant before the day of payment ; and in such action no allegation of payment would have been necessary. The covenants are independent, and each party has relied upon his remedy by action against the other. The case, therefore, differs from Callonel *v.* Briggs,[2] and from Goodisson *v.* Nunn,[3] Glazebrook *v.* Woodrow,[4] and other cases cited, where both acts were to be done at the same time, or on the same day.

[1] 1 Saund. 319. [2] 1 Salk. 112. [3] 4 T. R. 761. [4] 8 T. R. 366.

PATTESON, J. Pordage *v.* Cole[1] is directly in point. We must overrule it if we decide in favor of the defendant. There is no express provision that the conveyance shall be executed before payment, nor any reasonable intendment that it was to be necessarily precedent to, or concurrent with it. The words "completion of the purchase," which furnish the only plausible argument in the defendant's favor, only mean payment of the rest of the purchase-money. On the day specified, the defendant was to pay all the principal sum that remained due with interest up to that time; but he might have prevented the further running of interest by payment at any time before that day, if he pleased.

COLERIDGE, J. We must collect the intention of the parties from the whole instrument. It fixes with precision the time of payment, which is expressed to be the consideration of the sale and purchase, and contemplates the possible payment before that time. It is possible that "the completion of the purchase" may have the meaning attributed to it by Manning, but I see no good ground for this construction. The defendant might have paid all the money, and called for a conveyance immediately. The acts are clearly independent, within the rule correctly laid down by Williams in the note to Pordage *v.* Cole.[2]

Judgment for the plaintiff.

JUDSON *v.* BOWDEN.

IN THE EXCHEQUER, JUNE 2, 1847.

[*Reported in* 1 *Exchequer* 162.]

COVENANT. The declaration stated that by a certain indenture made on March 4th, 1845, between the plaintiff and the defendant (profert), the plaintiff and defendant did covenant and agree with each other in manner following—that is to say, that the plaintiff and the defendant would be and become partners in the profession or business of surgeons and apothecaries, for the term of one year, to be commenced and be computed from January 1st, 1845, if the plaintiff and defendant should so long live; that the partnership should be carried on at the house situate at Water Row, Ware, in the county of Hertford, then in the occupation of the plaintiff, under the style or firm of "Judson & Bowden," to be printed or engraved or otherwise

[1] 1 Saund. 319.

[2] 1 Wms. Saund. 320, note 4.

conspicuously posted and published on the principal outer door of the said house, and upon, under, and subject to the terms, conditions, and agreements following—that is to say, that the defendant should pay, and he did thereby covenant to pay, to the plaintiff the sum of £800, at the times and in manner hereinafter mentioned—viz., the sum of £400 upon the execution of the said indenture, and the several sums of £100 on March 25th, in the years 1846–47–48–49 respectively, the said sums making together the sum of £800 ; that the defendant should, in consideration of such payments, be entitled to the entire profits of the said business from January 1st, 1845, the defendant paying all expenses of carrying on the said business from the said last-mentioned date ; that the plaintiff should introduce the defendant to the patients and friends of the plaintiff, at first as a partner and ultimately as his successor, with the view and for the express purpose of securing to the defendant the confidence of the said patients and friends, and of obtaining for the defendant their future employment in the said business ; that the business of the said partnership should be carried on at the then residence of the plaintiff at Ware, and that the plaintiff should continue to reside and to practise as a surgeon and apothecary in the same residence till June 25th, 1845, and should at all reasonable times be ready and willing to attend and advise and prescribe for patients, and to assist the defendant in carrying on the said business of a surgeon and apothecary till January 1st, 1846, and at all subsequent times when the plaintiff should be at the said town of Ware or in its immediate vicinity ; that the plaintiff should, from and after January 1st, 1846, introduce the defendant as his successor in the said business, and should use his best endeavors to establish him in his practice as a surgeon and apothecary in the said town of Ware ; in consideration whereof the defendant thereby covenanted and agreed to pay to the plaintiff the further sum of £50 on March 25th, 1846, in addition to and beyond the said sum of £800 ; that the defendant should purchase from the plaintiff all the medical fixtures, drugs, and instruments then belonging to and used in the surgery of the plaintiff at Ware aforesaid, at a valuation to be made in the usual manner, the amount of such valuation to be paid within two months of the date of the said indenture. Averment of due observance and performance by the plaintiff of his part of the covenant. Second breach, non-payment of the said sum of £50, due on March 25th, 1846.

To this breach the defendant pleaded that after the said January 1st, 1846, to wit, on, etc., and on divers other days and times between that day and March 25th, 1846, being proper and

reasonable times in that behalf, he, the defendant, requested the plaintiff to introduce him as his, the plaintiff's, successor in the said business, to divers persons, to wit, T. C., F. E., W. C., and W. H., and divers other persons whose names are to the defendant unknown, and which said persons had been, and at the time of the execution of the said indenture, and up to the time when the plaintiff was requested by the defendant as aforesaid to introduce him, were respectively patients of the plaintiff. Yet the plaintiff did not nor would, at those several days and times when he was so requested as aforesaid, or at any or either of them, or at any other time hitherto, introduce the defendant to the said persons or any or either of them, but, on the contrary, the plaintiff then wholly refused and neglected, and from thence hitherto hath refused and neglected, to introduce the defendant to any of the said persons, nor has the plaintiff, from the said January 1st, 1846, hitherto, introduced the defendant at all to any person whomsoever, as his, the plaintiff's, successor in the said business, nor has the plaintiff, at any time since the said January 1st, 1846, used any endeavor whatever to establish the defendant in the practice of a surgeon and apothecary in the said town of Ware, but the plaintiff has wholly neglected and refused so to do. And the defendant in fact saith, that the plaintiff hath not at any time hitherto performed any part whatever of the said alleged consideration for his, the defendant's, said covenant to pay the plaintiff the said further sum of £50, contrary to the terms of the said indenture in that behalf. Wherefore he, the defendant, did refuse to pay the said sum of £50, so by him covenant to be paid in consideration of the plaintiff's introducing him, the defendant, and using his endeavors to establish him, the defendant, in the practice of a surgeon and apothecary, in the said town of Ware, as in the said indenture and in the said declaration mentioned, as it was lawful for the defendant to do for the cause aforesaid. Verification.

Special demurrer, assigning for causes, that it is not stated in or by the plea, nor does it appear therefrom, that the plaintiff could or might, or that he had the means or opportunity of introducing the defendant to the patients in the plea mentioned, nor is it stated in or by the plea that a reasonable time had elapsed for the plaintiff's so doing before the commencement of the suit, or before March 26th, 1846; and that the plea is bad, inasmuch as the covenant on the part of the plaintiff, to introduce the defendant to the plaintiff's patients, is not a condition precedent to the payment by the defendant to the plaintiff of the said sum of £50 in the declaration mentioned, but,

on the contrary thereof, the said covenant on the part of the defendant was and is a distinct and independent covenant, and in no way contingent on the performance by the plaintiff of his said covenant; and also that it does not appear by the plea that the defendant was ready and willing; and also that the plea is only good by reason of being an argumentative denial of plaintiff's performance of the condition on which he was to be paid, if any such condition there was; and lastly, that the plea improperly concludes with a verification instead of to the country. Joinder in demurrer.

Willes in support of the demurrer. The plea is bad. The introduction by the plaintiff of the defendant to his patients is not a condition precedent to his right to recover this sum of £50. If it were, the defendant would be absolved from payment of this sum if the plaintiff had neglected to do so in the smallest particular. It would also be unfair to the defendant if the covenant were to be considered as complete on March 25th, as the plaintiff would in that case be under no necessity of introducing him to any patient after the expiration of that time. The plaintiff is bound to use his best endeavors to introduce the defendant after the time fixed for the payment of the £50. Here the covenants are independent. The rule is correctly laid down in Saunders,[1] that "if a day be appointed for payment of money or part of it, or for doing any other act, and the day is to happen or may happen before the thing which is the consideration of the money or other act is to be performed, an action may be brought for the money, or for not doing such other act before performance; for it appears that the party relied upon his remedy, and did not intend to make his performance a condition precedent; and so it is where no time is fixed for performance of that which is the consideration of the money or other act." The note contains the report of Sir Richard Poole's Case, which is in point. The plea is also bad, as it is in fact a traverse, and therefore improperly concludes with a verification.

Hawkins in support of the plea. The sum of £50 was added, that the plaintiff should use his best endeavors to introduce the defendant to his patients, and to establish him in his profession as an apothecary, before March 25th; that is the consideration for the additional sum of money. [Pollock, C.B. It seems to me that it is quite consistent with this plea, that the plaintiff did use his best endeavors to introduce the defendant to other patients, though not the persons mentioned in the plea.] He cited Collins *v.* Gibbs, 2 Burr. 899.

[1] 1 Wms. Saund. 320*b*, note 1.

Per CURIAM.[1] The introduction by the plaintiff of the defendant to his patients is not a condition precedent to the payment of the £50. The plaintiff would be under the obligation to introduce the defendant after March 25th.

Judgment for the plaintiff.

SIBTHORP *v.* BRUNEL.

IN THE EXCHEQUER, APRIL 24, 1849.

[*Reported in* 3 *Exchequer* 826.]

COVENANT on an indenture of April 22d, 1847, executed by the plaintiff and defendant respectively (profert). The deed, after reciting that a company had been formed for the purpose of constructing a railway from Cheltenham to Oxford, and that the company was then applying to Parliament for an act of incorporation, and that the plaintiff was then the owner of an estate in the county of Oxford, which would be intersected by the said railway, and injuriously affected thereby, and that the plaintiff had petitioned Parliament against the said bill, etc., and that he had been requested by the defendant to desist from such opposition; it was thereby covenanted by the defendant "that within six months from the passing of the proposed bill into a law, and before the said company shall enter upon, take, or use any part of the said estate, etc., except for the purpose of setting out and ascertaining the land required to be taken, the said I. K. B. (the defendant) shall and will pay to the said C. D. S. (the plaintiff) the sum of £4000 sterling for the purchase of such part of the said estate as hereinafter described." Then followed covenants by which the company were to erect proper stations, etc., on the estate, and bridges, etc., and other matters with respect to the costs of the opposition to the bill, etc. Then followed this covenant by the plaintiff with the defendant, to withdraw from the said opposition, "and that, on payment by the said defendant to the plaintiff of the said sum of £4000 and interest after the rate of £5 per cent per annum after the expiration of six months after the passing of the said bill into a law to the day of payment of the said sum of £4000, he, the said plaintiff, and all necessary parties shall convey to the said defendant, his heirs or assigns, or as he or they shall direct, so much of the said estate as shall be required for the

[1] Pollock, C.B., Alderson, Rolfe, Platt, BB.

construction of the said railway in the line delineated upon the said plans, deposited as aforesaid, not exceeding 12 acres 1 rood and 10 perches of land ; but the costs, charges, and expenses attending the deducing of the title, and the conveyance of the said land or otherwise, occasioned by the taking of the said land by the company, shall be paid and borne by the company in the manner directed by the 'Lands Clauses Consolidation Act, 1845,' together with the usual surveyors' charges attending the purchase," etc.; and lastly, "it is hereby agreed and declared by and between the said parties, that if the said defendant shall, within six months after the passing of the said bill into a law, procure and deliver to the plaintiff a good and sufficient agreement, under the seal of the said company, binding the said company to the observance and performance of the several stipulations and agreements on the part of the defendant, his executors, etc., hereinbefore contained ;" then the said agreement was to be null and void, otherwise it was to remain in full force and effect. The declaration then contained an allegation, that, after the making of this agreement, etc., the said proposed bill, to wit, on, etc., passed into a law, and a general averment of performance, and that six months had elapsed since the passing of the said bill, and laid as a breach the non-payment of the purchase-money of £4000.

The defendant, having craved oyer of the deed, and set it out, demurred generally to the declaration, on the ground that a general averment of performance by the plaintiff was not sufficient, but that he ought to have shown by his declaration that he was ready and willing to convey the property to be purchased, and that the covenant to pay and the covenant to convey on payment were dependent covenants. Joinder in demurrer.

Keating in support of the demurrer.

Willes, contra.

POLLOCK, C.B. I am clearly of opinion that the plaintiff is entitled to the judgment of the Court. This is a positive covenant to pay the amount of the purchase-money at a specified time. The case of Mattock *v.* Kinglake, to which my Brother Parke has referred, is a decision expressly in point. Applying the rule as laid down by Tindal, C.J., in Stavers *v.* Curling, I think this covenant to pay the money is wholly independent of that to convey the estate ; and that such was the intention of the parties at the time this instrument was executed is perfectly clear from its terms. The rule, as derived from Pordage *v.* Cole, may be the technical one ; but whether the language of these covenants be subject to a technical construction,

or to their natural one, the result will be the same, that they are independent of each other.

PARKE, B. I am entirely of the same opinion. I think it is clear that these covenants are wholly independent, and that the case is a very plain one. The words of the covenant upon which this action is brought, are, that the plaintiff shall pay the sum agreed for the purchase of the land ; if they had been upon, or even for the conveyance of the land, the defendant's argument might have been tenable, but they amount to a positive covenant to pay the money at a specified time.

ROLFE, B., concurred.

PLATT, B. The condition has occurred upon which the money became payable. There is no other condition precedent.

Judgment for the plaintiff.

CHRISTIE *v.* BORELLY.

IN THE COURT OF COMMON PLEAS, JANUARY 17, 1860.

[*Reported in* 29 *Law Journal Reports, Common Pleas, New Series*, 153.]

THE first count of the declaration stated that, in consideration that the plaintiff guaranteed to the defendant that two bills of exchange, of £100 and £62, both drawn by Messrs. C. W. Olivier & Co. upon Messrs. Owen & Co., 75 Lower Thames Street, and both due on January 23d, 1859, would be paid and retired by the said Messrs. Owen & Co. when due, the defendant, in return, engaged and guaranteed to the plaintiff the repayment of the sum of £300 toward the payment of Scotch whiskies, as follows : Six puncheons, 5 hhds., 4 qr. casks, Auchtertool, 2 puncheons, 5 hhds., 8 qr. casks, Anderton, which Mr. B. Fisse, of Norris Street, had ordered, and was about to receive from the plaintiff. Averment, by the plaintiff, that he had performed all things on his part to be done and performed, in pursuance of the said agreement, to entitle him to the due performance by the defendant of his, the defendant's, part of the said agreement ; and that the said two bills of exchange of £100 and £62 were duly paid and retired by the said Messrs. Owen & Co. when the same became and were due and payable ; and that he, the plaintiff, delivered to the said Mr. B. Fisse the said Scotch whisky, in the said agreement hereinbefore mentioned, and that the said Mr. B. Fisse, although requested to pay the said amount of £300 toward the payment of the said

Scotch whiskies, had not paid for the said Scotch whiskies, nor the said sum of £300 or any part thereof, and the same still remained wholly due and unpaid ; yet that the defendant had disregarded and broken his said promise in this, that he had not paid, or caused to be paid, to the plaintiff the said sum of £300, or any part thereof, but, on the contrary thereof, wholly neglected and refused so to do.

The defendant pleaded (*inter alia*), secondly, to the said first count, that, although the said debt and sum of £300, in the said first count mentioned, repayment whereof the defendant engaged and guaranteed to the plaintiff, was not payable, and, by the terms of the said order of the said Mr. B. Fisse, was not payable until after the said two bills drawn by Messrs. C. W. Olivier upon Messrs. Owen & Co., and guaranteed by the plaintiff, became due and payable, as the plaintiff and the defendant, at the time of the making of the said mutual agreement and guarantees, well knew ; yet the said two bills of exchange of £100 and £62, in the said first count mentioned, were not duly or at any time paid or retired by the said Messrs. Owen, of which the plaintiff had due notice, but never at any time paid or retired the said bills. Issue thereon.

The defendant having, at the trial, obtained a verdict in his favor on the issue taken on the second plea, the Court, in Michaelmas Term last, on the application of Edward James, granted a rule *nisi* to enter judgment for the plaintiff on such issue *non obstante veredicto*, on the ground that the said second plea was no answer to the action. Against this rule

Petersdorff and *Garth* now showed cause.

Grant in support of the rule.

ERLE, C.J. I am of opinion that this rule should be made absolute, and that the plaintiff is entitled to have judgment entered for him *non obstante veredicto*. The real question is, whether the promises are independent promises, or whether they are mutual promises, their performance being mutually the consideration for each other. It appears to me that they are independent promises. The defendant guarantees the repayment of £300 toward the payment of certain whisky being paid for when due ; and the plaintiff guarantees that two bills of exchange of £100 and £62 shall be paid when due. It, therefore, appears that the damages in respect of the breach on one side must be very different from the damages arising from the breach on the other side ; on the one side they would be £300, and on the other only £162 ; it is consequently apparent, on the face of the contract itself, that it was not intended by the parties that performance of the one stipulation should be a condi-

tion precedent to performance of the other. The question is, to my mind, one entirely of fact—namely, what was the intention of the parties to this contract? The rules of law are agreed on by both sides, and it is only a question of construction. On the construction of this contract, I am of opinion that the performance of the plaintiff's promise was not a condition precedent; and, therefore, that the second plea is no answer, and consequently that the rule ought to be made absolute.

WILLIAMS, J. The rules of law are now well established, and the object is to discover in each case what is the intention of the parties. If it had appeared from the contract in the present case, that the undertaking of the plaintiff had been to pay absolutely when the bills became due, the case would have been a very different one from what it is. What, however, the plaintiff undertakes is, only to pay if Messrs. Owen do not retire the bills; therefore, the compensation to be paid by the plaintiff, in consequence of such third party not doing their duty, is a matter which must have to be afterward ascertained; and is it likely that it was the intention of the parties to this contract that the defendant's performance was not to take place until after such amount of compensation had been ascertained? It is, I think, obvious that such could not have been the intention of the parties; for Messrs. Owen might have retired the bills when due, and so there would have been nothing at all payable by the plaintiff.

Rule absolute.[1]

SPILLER AND ANOTHER *v.* WESTLAKE.

IN THE KING'S BENCH, APRIL 19, 1831.

[*Reported in* 2 *Barnewall & Adolphus* 155.]

THIS was an action brought by the plaintiffs, as payees, against the defendant as maker, of a promissory note for £200, bearing date of September 5th, 1829, payable on February 2d, 1830. Plea, the general issue. At the trial before Taunton, J., at the last assizes for the county of Somerset, the plaintiff having proved the note, it was contended on the part of the defendant that there was no consideration for the note, inasmuch as the money for which it was drawn was, by agreement, to be paid in consideration of the plaintiffs executing a conveyance of a certain estate to the defendant, which they had not done. The agreement bore the same date with the note, and its terms,

[1] The concurring opinion of Willes, J., has been omitted.—ED.

as to this matter, were to the following effect. The plaintiffs in consideration of £200 to them then paid or secured to be paid by the defendant, and of the further sum of £1140 to be paid to them by the defendant on February 2d then next, promised to surrender and convey to the defendant an estate in the agreement described, subject to two mortgages therein mentioned, in consideration whereof the defendant agreed to pay the plaintiffs on the making and passing of such surrender and conveyance the said sum of £1140, making, with the sum of £200 that day paid or secured to be paid as aforesaid, the full consideration-money agreed to be paid for the purchase of the estate. The note in question was given to secure the £200. A dispute having arisen between the plaintiffs and the mortgagee as to the precise sum due to the latter, he refused, until that was settled, to convey the legal estate, and the plaintiffs were thereby prevented from assigning the legal estate to the defendant on February 2d (on which day the note was payable), and informed the defendant they could not do so. The learned judge overruled the objection, but reserved liberty to the defendant to move to enter a nonsuit. A verdict having been found for the plaintiffs.

Merewether now moved as above, and contended that according to Jones *v.* Barkley, Dougl. 684; Phillips *v.* Fielding, 2 H. Bl. 123, and Glazebrook *v.* Woodrow, 8 T. R. 366, the payment of the purchase-money and the execution and tender of the conveyance being concurrent acts, the vendor could not recover the purchase-money without having executed the conveyance or offered to do so. The conveyance of the estate was the only consideration for the note, and that consideration having failed, the plaintiffs were not entitled to recover. If the plaintiffs had paid the £200, as a deposit, they might now have recovered it back.

Lord Tenterden, C.J. Where, by one and the same instrument, a sum of money is agreed to be paid by one party, and a conveyance of an estate to be at the same time executed by the other, the payment of the money and the execution of the conveyance may very properly be considered concurrent acts, and in that case no action can be maintained by the vendor to recover the money, until he executes or offers to execute a conveyance; but here the vendee by a distinct instrument agreed to pay part of the purchase-money on February 2d. I can see no reason why he should have executed a distinct instrument whereby he promised to pay a part of the purchase-money on a particular day, unless it was intended that he should pay the money on that day at all events. In the cases cited, the con-

current acts were stipulated for in the same instrument; here the payment of the £200 (which was part only of the purchase-money) was separately provided for.

LITTLEDALE, J., concurred.

PARKE, J. I incline to think that the defence to this action would have been maintainable, if the circumstances had been such that the defendant, having paid the £200 as a deposit, would have been entitled to recover it back, but it is perfectly clear that he could not have been so entitled as long as the contract remained open. Now here the contract remained open at the time when the action was commenced, for the plaintiffs agreed only to convey the estate subject to the two mortgages. They were never bound to convey the legal estate to the defendant, but merely the equity of redemption; and that they had never refused to convey. There can, therefore, be no rule.

TAUNTON, J., concurred.

Rule refused.

EBENEZER HUNT *v.* EDWARD ST. LOE LIVERMORE.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, OCTOBER TERM, 1827.

[*Reported in* 5 *Pickering* 395.]

ASSUMPSIT on a promissory note from the defendant to the plaintiff, not negotiable, dated February 26th, 1823, for $1400, payable on demand.

At the trial before Morton, J., the plaintiff called a witness, who testified that on December 2d, 1824, the plaintiff demanded of the defendant payment of the note, or a return of the bond hereafter mentioned; but that the defendant did not pay the note, nor return the bond, but replied that what is written is written.

The defendant then gave in evidence a bond from the plaintiff, dated February 26th, 1823, conditioned that the plaintiff, upon the defendant's paying him the sum of $1400, should make and execute to the defendant a good and valid warranty deed of certain land which the defendant had agreed to purchase of the plaintiff for the sum mentioned.

The defendant also produced the following receipt, signed by the plaintiff:

"February 26, 1823.

"Received of E. S. Livermore a note of hand for $1400, for which I have this day given him a bond for a deed of a certain piece of land; but provided the bargain is not carried into effect, I am to deliver up said note upon said Livermore's delivering up said bond."

The defendant contended that the plaintiff was not entitled to his action before he had tendered a deed of the estate described in the bond, and that the defendant now had a right to rescind the contract referred to in the bond and receipt, and to return the bond to the plaintiff, which he offered to do in court. But the judge being of opinion that these facts did not amount to a defence against the note, directed the defendant to be called. If the whole Court should be of a different opinion, the default was to be taken off and the plaintiff to become nonsuit.

Livermore and *Hoar* for the defendant.

Stearns, *contra*.

The opinion of the Court was drawn up by

PUTNAM, J. We think that the note, the receipt and the bond should be construed as if they were parts of one contract.

The plaintiff on his part agreed to convey the land to the defendant when he should pay the purchase-money, and the defendant agreed to pay the purchase-money when the plaintiff should convey the land. As no time for the conveyance or for the payment is mentioned, the law supplies the deficiency, by providing that the contract should be executed in a reasonable time. And an offer to do what the contract required of either party, and a demand and refusal of the other to do what was required by him, would entitle the party so offering to perform, to a remedy upon the contract. It is clear to our minds that the contract is to be construed as containing dependent stipulations. Neither party intended to trust to the personal security of the other. If Hunt had in a reasonable time offered to give a good deed of the land, and had demanded payment of the money mentioned in the note, and Livermore had refused to accept the deed and to pay according to his engagement, Hunt would have had his remedy at law against Livermore for the purchase-money. On the other hand, if Livermore had in a reasonable time offered to pay his note, and had demanded a deed, and Hunt had refused to accept the money and to give the deed simultaneously, Livermore would have had his remedy at law against Hunt for the damages sustained by his not conveying the land according to his agreement.

If the stipulation contained in the receipt of the plaintiff, to

deliver up the note upon the defendant's delivering up the bond, "provided the bargain is not carried into effect," were to be construed to give either party an election at his own pleasure to annul the contract, it is evident that the contract could never be carried into effect against him who should please to avoid it. It would in effect have no binding operation. It would not be what the civil law defines, *juris vinculum quo necessitate adstringimur*. "It is of the essence of all agreements which consist of promising something, that they should produce an obligation in the party making the promise, to discharge it; hence it follows, that nothing can be more contradictory to such an obligation than the entire liberty of the party making the promise, to perform it or not as he may please." Pothier on Oblig., No. 47–48. The case at bar strongly illustrates that position. If it were, that either party had the entire liberty of vacating it, the contract would be void for want of obligation. It would stand thus, Hunt engages to convey his land to Livermore for $1400, if Hunt shall please to do so; and Livermore engages to pay $1400 for the land, if he shall please to do so. We cannot suppose the parties intended to make such a vain bargain. We are satisfied that it was a valid contract, containing dependent stipulations to be performed by each before he could compel a performance by the other. It follows, therefore, that the plaintiff was not entitled to the money or price of the land, inasmuch as he neglected to offer to convey the land by a proper deed.

We are all of opinion that the default should be taken off, and that the plaintiff should be nonsuited

CHAPTER VII.

REMEDY FOR BREACH OF CONTRACT.

ROBINSON *v.* HARMAN.

In the Exchequer, January 18, 1848.

[*Reported in* 1 *Exchequer* 850.]

Assumpsit on an agreement in writing, dated April 15th, 1846, whereby the defendant agreed "to grant and deliver to the plaintiff a good and valid lease of a certain dwelling-house, etc., and other hereditaments and premises in the agreement mentioned, for a term of twenty-one years from the 29th day of September then next ensuing, at the yearly rent of £110," etc. The declaration set out the agreement in terms, and, after alleging mutual promises, averred that, although the plaintiff had always been ready and willing to accept a lease, yet the defendant did not nor would grant a good and valid lease of the said dwelling-house, etc., and discharged the plaintiff from preparing and tendering such lease, and wholly neglected and refused to grant or deliver the said or any lease whatever of the said hereditaments and premises; "whereby the plaintiff lost and was deprived of great gains and profits, which would otherwise have accrued to him, and paid, expended, and incurred liability to pay divers sums of money, in and about the preparation of the said agreement and lease, etc., amounting, to wit, to £20."

Plea, payment of £25 into court, and no damages ultra.

The plaintiff replied damages ultra, upon which issue was joined.

At the trial before Lord Denman, C.J., at the Surrey Spring Assizes, 1847, it was proved that the plaintiff and defendant had entered into the agreement set out in the declaration, by which the defendant agreed to grant to the plaintiff a good and valid lease of a dwelling-house and premises, situate in High Street, Croydon, for a term of twenty-one years from September 29th, 1846, at a yearly rent of £110. The premises in question had

belonged to the defendant's father, who was recently dead, and in consequence, the plaintiff's solicitor, while preparing the agreement, asked the defendant whether he was sure that he had power to grant the lease without the concurrence of other parties, and suggested that the will might have vested the legal estate, or the power of leasing, in trustees. The defendant replied that there was nothing of the sort, that it was his property out and out, and that he alone had the power of leasing. It appeared, however, that the defendant's father had devised the premises in question (subject to an annuity of £300 to his daughter) to trustees, to pay the defendant a moiety of the rent during his life only. The premises were worth considerably more than £110 a year, and the bill of the plaintiff's solicitor, for preparing the agreement and lease, and investigating the title, amounted to £15 12*s.* 8*d.* On the part of the defendant, evidence was tendered to show that the plaintiff, when he entered into the agreement, had full knowledge of the defendant's incapacity to grant the lease ; but the learned judge ruled that such evidence was inadmissible. It was urged, on the part of the defendant, that the plaintiff could not recover damages for the loss of his bargain ; and that, as the sum paid into court exceeded the expenses which he had been put to, the defendant was entitled to the verdict. The learned judge was of a different opinion, and a verdict was found for the plaintiff for £200 beyond the sum paid into court.

A rule *nisi* having been obtained to set aside the verdict and for a new trial,

Shee and *Willes* now showed cause.

Montagu Chambers in support of the rule.

PARKE, B. The rule must be discharged. The defendant contracted to grant a good and valid lease, and the learned judge was right in rejecting evidence which would go to alter the contract admitted by the plea.

The next question is, What damages is the plaintiff entitled to recover ? The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed. The case of Flureau *v.* Thornhill qualified that rule of the common law. It was there held that contracts for the sale of real estate are merely on condition that the vendor has a good title ; so that, when a person contracts to sell real property, there is an implied understanding that, if he fail to make a good title, the only damages recoverable are the expenses which the vendee may be put to in investigating the title. The present case

comes within the rule of the common law, and I am unable to distinguish it from Hopkins *v.* Grazebrook.

ALDERSON, B. I am of the same opinion. The damages have been assessed according to the general rule of law, that where a person makes a contract and breaks it, he must pay the whole damage sustained. Upon that general rule an exception was engrafted by the case of Flureau *v.* Thornhill, and upon that exception the case of Hopkins *v.* Grazebrook engrafted another exception. This case comes within the latter, by which the old common-law rule has been restored. Therefore the defendant, having undertaken to grant a valid lease, not having any color of title, must pay the loss which the plaintiff has sustained by not having that for which he contracted.

PLATT, B. Upon general principle, I cannot distinguish this case from Hopkins *v.* Grazebrook.

Rule discharged.

HINCKLEY *v.* PITTSBURGH BESSEMER STEEL COMPANY.

IN THE SUPREME COURT OF THE UNITED STATES, APRIL 18, 1887.

[*Reported in* 121 *United States Reports* 264.]

THIS was an action at law, brought in the Circuit Court of the United States for the Northern District of Illinois, by the Pittsburgh Bessemer Steel Company, Limited, a Pennsylvania corporation, against Francis E. Hinckley, to recover damages for the breach by Hinckley of a written contract for the purchase by him from the company of 6000 tons of steel rails. The contract was as follows :

"*Memorandum of Sale.*

"The Pittsburgh Bessemer Steel Company, Limited, have sold and hereby agree to make and deliver to the order of F. E. Hinckley, Esq., 204 Dearborn Street, Chicago, Ill., and the said Hinckley has purchased and agrees to pay for, six thousand gross tons of first quality steel rails, to weigh fifty-two (52) pounds to the yard, and to be rolled true and smooth to the pattern to be furnished by the said Pittsburgh Bessemer Steel Company, Limited, pattern No. 5.

"Said rails are to be made of the best quality of Bessemer steel, and to be subject to inspection as made and shipped, and

to be well straightened and free from flaws, and to be drilled as may by directed ; at least ninety per cent shall be in thirty (30) feet lengths, with not over ten (10) per cent of shorter lengths, diminishing by one foot differences, none to be less than twenty-four (24) feet.

" All second quality rails or excess of shorts which may be made, not exceeding five (5) per cent of each month's shipments, to be taken at the usual reduction of ten (10) per cent in price, and to be piled and shipped separately (painted white on both ends), as may be ordered by the inspector.

" Deliveries to begin in May, 1882, in which month one thousand tons shall be delivered, and to continue at the rate of twenty-five hundred tons per month after July 1st, 1882, until finished, strikes and accidents beyond ordinary control of said steel company, and acts of Providence preventing or suspending deliveries, alone excepted, in which case deliveries are to be delayed for a corresponding length of time only.

" Price to be fifty-eight dollars net per ton of 2240 pounds of finished steel rails, ex. ship or f. o. b. cars at Chicago, Ill., seller's option.

" Terms of payment, cash on delivery of inspector's certificate for each five hundred tons as fast as delivered. If shipment is delayed without fault of said steel company, payment is to be made in cash upon completion and delivery of each five hundred tons at Chicago and inspector's certificate. Rails to be inspected at mill as fast as completed and ready for shipment.

" In witness whereof, the said Hinckley has hereto set his hand and seal, and the Pittsburgh Bessemer Steel Company, Limited, by its duly authorized officers, hath signed and affixed its corporate seal, the day and year aforesaid.

" It is further agreed, that the Pittsburgh Bessemer Steel Company, Limited, are not to be responsible for delays resulting from failure of railroads to furnish cars, proper efforts having been made to procure them, nor for detentions after shipment has been made.

" It is understood that the purchaser shall have the right to make one half of the order fifty-six (56) pounds per yard, pattern No. 4 of said steel company, notice to be given thirty days before the time for the delivery of the rails.

" Chicago, Ill., February 18th, 1882.

" F. E. HINCKLEY.

" C. H. ODELL, *Broker.*"

One copy of the contract was signed by Hinckley, and a duplicate of it was signed by the company.

The defendant pleaded the general issue, and the case was tried by the Court on the due waiver of a jury. The Court made the following special finding of facts :

" 1. That the written agreement set out and described in the declaration was duly executed by the plaintiff and defendant in said cause, as alleged in said declaration.

" 2. That immediately after the making of said contract, and before the time to begin the execution thereof, the plaintiff purchased the requisite amount of material from which to manufacture the six thousand tons of steel rails called for by said contract, and that, after the purchase of said supplies by plaintiff, there was a decline in the value thereof, before the time for the delivery of any portion of said rails, and that lower prices for such supplies ruled during the months of May, June, July, and August, 1882.

" 3. That it appears from the parol proof heard on said trial, aside from the provision in said written contract in regard to drilling directions, that it was usual and customary for the purchaser of steel rails to give directions as to the drilling thereof, and that each railroad company has its own special rules for drilling, and the drilling of such rails is considered in the trade as a part of the work of manufacture, and a part of the duty of the manufacturer in order to fully complete the rails for use.

" 4. That, by letters dated April 3d, April 20th, April 26th, and April 28th, from plaintiff's agents to defendant, and which letters were duly received by defendant before May, 1882, defendant was requested to furnish drilling directions for the rails to be delivered in May under said contract, and defendant not only neglected to comply with such request and furnish such directions, but defendant also notified plaintiff, in reply to such request, that he, defendant, was not then prepared to receive the rails which were to be delivered under said contract in the month of May.

" Again, about the 15th of June, defendant informed plaintiff that he was becoming discouraged about being able to take the rails.

" That, about June 23d, plaintiff notified defendant that it was ready to commence rolling the rails for the July deliveries, as well as to cover the thousand tons specified in the contract for delivery in May, of which plaintiff had postponed delivery at defendant's request, and asked for drilling directions from the defendant, but defendant wholly neglected to give such drilling directions.

" That about the 26th of July, defendant, in substance informed plaintiff's agents, that his financial arrangements for

money to pay for said rails, pursuant to said contract, had failed, and that he could not take said rails unless plaintiff would sell them to him on six and twelve months' credit, for which the notes of the railroad company for which defendant was acting would be given, which defendant would endorse, and also further secure with first-mortgage bonds, as collateral, at fifty cents on the dollar, but, unless he could secure the rails on such terms, he could not take them, and that plaintiff declined to accept said proposition for the purchase of said rails on credit ; and I further find, that, on the 30th of August, 1882, plaintiff notified defendant that the time for the completion of his contract for the purchase of said rails had expired, and requested the defendant to advise it whether he would accept the rails or not. To this request defendant made no reply.

" I further find, that, while plaintiff did not expressly agree with defendant to postpone the time for the delivery of the rails to be made and delivered under said contract, yet plaintiff did in fact delay the rolling and delivery of the rails to be delivered in May, and that, by reason of the repeated statements of defendant that he was not ready to give drilling directions, not ready to use said rails, and not ready to accept them, plaintiff did postpone rolling said rails, and in fact never rolled any rails to be delivered on said contract, but that plaintiff was at all times during the months of May, July, and August ready and able, in all respects, to fulfil said contract and make said rails, and the same would have been ready for delivery, as called for by said contract, if defendant had furnished drilling directions, and had not stated to plaintiff's agents that he was not ready to furnish said drilling directions and not ready to accept said rails.

" I further find, that, on or about the 15th day of September, 1882, defendant was formally requested to furnish drilling directions and to accept said rails, and that he replied to such request that he should decline to take any rails under said contract, and that he had made arrangements to purchase rails of others at a good deal lower price.

" I therefore find, from the testimony in this case, that defendant, by requesting plaintiff to postpone the delivery of said rails, and by notifying the plaintiff that he was not ready to accept and pay for said rails, excused the plaintiff from the actual manufacture of said rails and a tender thereof to defendant.

" And I further find, that defendant's statement to plaintiff, on the 26th of July, that he could not pay cash for said rails,

as called for by the contract, and that he wished to buy them on credit, was in fact a notice that he would not be able to pay for said rails if rolled and tendered to him by plaintiff.

"I therefore conclude, and so find as a matter of fact, from the evidence in the case, that said plaintiff in apt time requested defendant to furnish directions for the drilling of said rails, and that defendant neglected and refused to do so, and that, although plaintiff was ready and able to fully perform said contract, and make and deliver said rails to defendant, as required by said contract, defendant refused to accept and pay for said rails.

"5. That plaintiff manufactured and sold to other persons 4000 tons of steel rails, from the materials so purchased with which to perform said contract with defendant, for which said rails plaintiff received $54.60 per ton, delivered at a port on Lake Huron, and that plaintiff made a profit of $1.60 per ton on said 4000 tons; that, by reason of defendant's refusal to accept said rails, the plaintiff had no employment for its mill for a time, and was obliged to stop its mill for about three weeks, in the month of August, 1882.

"6. That it would have cost plaintiff $50 per ton to have manufactured and delivered the rails called for by said contract to defendant, according to the terms of said contract; so that plaintiff's profits, if it had not been prevented from fulfilling said contract by the conduct of defendant, would have been $8 per ton on each ton of rails called for by said contract.

"And, because of said facts, I find that defendant was guilty of a breach of said contract, and that plaintiff hath sustained damage, by reason of such breach, in the sum of $42,400."

On these findings, a judgment was entered for the plaintiff for $42,400 damages, and for costs. 17 Fed. Rep. 584. To review that judgment the defendant brought this writ of error. After the record was filed in this Court, it being discovered that there was an error in computation in entering the judgment for $42,400, instead of $41,600, the Circuit Court allowed the plaintiff to remit the difference, $800, and an order was entered accordingly as of the date of the judgment.

Thomas S. McClelland for plaintiff in error.

John N. Jewett for defendant in error.

BLATCHFORD, J., after stating the case as above reported, delivered the opinion of the Court.

On the special findings, the only question open for review is, whether the facts found are sufficient to support the judgment. There can be no question that, on those facts, the defendant is liable in damages for a breach of the contract. It is provided

in the contract, that the rails are "to be drilled as may be directed." The Circuit Court finds that it appears from the proof, aside from the provision in the written contract in regard to drilling directions, "that it was usual and customary for the purchaser of steel rails to give directions as to the drilling thereof;" that each railroad has its own special rules for drilling; that the drilling of the rails is considered in the trade as a part of the work of manufacture, and a part of the duty of the manufacturer, in order to fully complete the rails for use; that, by four letters written in April, 1882, by the agents of the plaintiff to the defendant, and which letters were duly received by the defendant before May, 1882, he was requested to furnish drilling directions for the 1000 tons of rails to be delivered in May, under the contract; that he neglected to comply with that request, and also notified the plaintiff that he was not then prepared to receive the rails which, by the contract, were to be delivered in May; that, in June, the plaintiff again asked for drilling directions from the defendant, in respect both to the 1000 tons, and to the 2500 tons to be delivered in July, but the defendant neglected to give such drilling directions; and that, in the latter part of July he notified the plaintiff, in substance, that he would not perform the contract. The Circuit Court further finds, that, by reason of the repeated statements of the defendant that he was not ready to give drilling directions, not ready to use the rails, and not ready to accept them, the plaintiff postponed the rolling of them, and never rolled any rails to be delivered on the contract, but was at all times during May, July, and August, 1882, ready and able to fulfil the contract and make the rails, and the same would have been ready for delivery as called for by the contract, if the defendant had furnished drilling directions, and had not stated to the agents of the plaintiff that he was not ready to furnish the drilling directions, and not ready to accept the rails; and that, on or about September 15th, 1882, he was formally requested to furnish drilling directions and to accept the rails, and replied to such request that he should decline to take any rails under the contract, and had made arrangements to purchase rails of others at a lower price. The Circuit Court also finds that the defendant, by requesting the plaintiff to postpone the delivery of the rails, and by notifying the plaintiff that he was not ready to accept and pay for them, excused the plaintiff from actually manufacturing them and tendering them to the defendant. This conclusion is entirely warranted by the facts found, and, on those facts, the defendant must be held liable in damages. The only other question open on the findings is as to the proper rule of damages.

The Circuit Court finds that it would have cost the plaintiff $50 per ton to have manufactured and delivered the rails called for by the contract, according to its terms; that the profits of the plaintiff, if the conduct of the defendant had not prevented it from fulfilling the contract, would have been $8 per ton on each of the 6000 tons, being $48,000; and that the plaintiff manufactured and sold to other persons 4000 tons of rails from the materials purchased by it with which to perform the contract with the defendant, and received for such rails $54.60 per ton, and made a profit of $1.60 per ton on the 4000 tons, being a profit, in all, of $6400. Deducting this $6400 from the $48,000, leaves $41,600, for which amount the judgment was finally entered.

The defendant contends that the plaintiff should have manufactured the rails and tendered them to the defendant, and, upon his refusal to accept and pay for them, should have sold them in the market at Chicago, and held the defendant responsible for the difference between what they would have brought on such sale and the contract price. But we think no such rule is applicable to this case. This was a contract for the manufacture of an article, and not for the sale of an existing article. By reason of the facts found as to the conduct and action of the defendant, the plaintiff was excused from actually manufacturing the rails, and the rule of damages applicable to the case of the refusal of a purchaser to take an existing article, is not applicable to a case like the present. The proposition, that, after the defendant had, for his own purposes, induced the plaintiff to delay the execution of the contract until after August 31st, 1882, and had thereafter refused to take any rails under the contract, the plaintiff should still have gone on and made the 6000 tons of rails and sold them in the market for the defendant's account, in order to determine the amount of its recovery against the defendant, can find no countenance from a court of justice.

It is found by the Circuit Court that, immediately after the making of the contract and before the time to begin its execution, the plaintiff purchased the requisite amount of material from which to manufacture the 6000 tons of rails; that, after the purchase of such supplies, there was a decline in their value before the time arrived for the delivery of any part of the rails; and that lower prices for such supplies rule during May, June, July, and August, 1882. It is also to be inferred, from the price at which the 4000 tons of rails were sold by the plaintiff, that the market price of rails declined below the price named in the contract; and the reason assigned by the defendant, in

September, 1882, for not taking any rails under the contract, was, that he had made arrangements to purchase rails of others at a lower price. Under these circumstances, the defendant is estopped from insisting that the plaintiff should have undertaken the risk and expense of actually making and selling the rails. These considerations also show that the rule of damages adopted by the Circuit Court was the proper one. It was in accordance with the rule laid down by this Court in Philadelphia, Wilmington & Baltimore Railroad Co. *v.* Howard, 13 How. 307. In that case a contractor for the building of a railroad sued the company for its breach. On the question of damages this Court said, p. 344 : "It must be admitted that actual damages were all that could lawfully be given in an action of covenant, even if the company had been guilty of fraud. But it by no means follows that profits are not to be allowed, understanding, as we must, the term 'profits' in this instruction, as meaning the gain which the plaintiff would have made if he had been permitted to complete his contract. Actual damages clearly include the direct and actual loss which the plaintiff sustains *propter rem ipsam non habitam.* And in case of a contract like this, that loss is, among other things, the difference between the cost of doing the work and the price to be paid for it. This difference is the inducement and real consideration which causes the contractor to enter into the contract. For this he expends his time, exerts his skill, uses his capital, and assumes the risks which attend the enterprise. And to deprive him of it, when the party has broken the contract and unlawfully put an end to the work, would be unjust. There is no rule of law which requires us to inflict this injustice. Wherever profits are spoken of as not a subject of damages it will be found that something contingent upon future bargains, or speculations, or states of the market, are referred to, and not the difference between the agreed price of something contracted for and its ascertainable value or cost. See Masterton *v.* Mayor of Brooklyn, 7 Hill, 61,[1] and cases there referred to. We hold it to be a clear rule that the gain or profit of which the contractor was deprived by the refusal of the company to allow him to proceed with and complete the work, was a proper subject of damages."

In United States *v.* Speed, 8 Wall. 77, where the defendant agreed to pack a specified number of hogs for the plaintiff, and made all his preparations to do so, and was ready to do so, but the defendant refused to furnish the hogs to be packed, this Court, citing with approval Masterton *v.* Mayor of Brooklyn,[2]

[1] S. C. 42 Am. Dec. 38. [2] *Ibid.*

held that the measure of damages was the difference between the cost of doing the work and the price agreed to be paid for it, "making reasonable deduction for the less time engaged, and for release from the care, trouble, risk, and responsibility attending a full execution of the contract."

These views were again approved by this Court in United States *v.* Behan, 110 U. S. 338.

In the present case the ability of the plaintiff to fulfil the contract at all times is found as a fact by the Circuit Court, as also the fact, that, by reason of the defendant's refusal to accept the rails, the plaintiff was obliged to stop its mill for about three weeks, in August, 1882. The defendant received the benefit of all the mitigation of damages which, upon the facts found, he was entitled to claim, and the benefit of all the profits made by the plaintiff which could properly be regarded as a substitute for the profits it would have received had its contract with the defendant been carried out.

The defendant objects that, within the statement of the rule in United States *v.* Speed, there was no deduction made in this case for the time saved, and the care, trouble, risk, and responsibility avoided by the plaintiff by not fully executing the contract; but there are no findings of fact which raise any such question. The finding is, that it would have cost the plaintiff $50 per ton to have manufactured and delivered the rails called for by the contract according to its terms. Under this finding, it must be held that every proper element of cost entered into the $50; and it was for the defendant to have requested findings which would authorize an increase of that sum as cost.[1]

The judgment of the Circuit Court is affirmed.

OLIVER W. BARNES, RESPONDENT AND APPELLANT, *v.* GEORGE W. BROWN, APPELLANT, ET AL., RESPONDENTS.

IN THE COURT OF APPEALS OF NEW YORK, JANUARY 20, 1892.

[*Reported in* 130 *New York Reports* 372.]

APPEAL by the defendant Brown from order of the General Term of the Supreme Court in the first judicial department, made February 3d, 1890, which reversed a judgment in his favor entered upon the report of a referee and granted a new trial.

[1] A portion of the opinion relating to the admission of evidence has been omitted.—ED.

Also appeal by the plaintiff from judgment of the same General Term, entered upon the same order, which modified and affirmed as modified a judgment in favor of the defendants Seligman entered upon the report of a referee.

This action was brought to recover damages for the alleged breach of a contract, of which the following is a copy, to wit:

"Oliver W. Barnes having by instruments bearing even date herewith, assigned and transferred to us, George H. Brown and Joseph Seligman, all claims and demands against the New York city Central Underground Railway Company, and his title to certain subscriptions to the capital stock of said company, and also any interest he may have in a certain alleged contract made with the said company by Francis P. Byrne, and having also transferred sixty shares of stock in said company. Now we, George H. Brown and Joseph Seligman, do hereby, in consideration of the premises and of one dollar to us paid by the said Oliver W. Barnes, agree that we will, upon certain amendments to the charter of the said New York City Central Underground Railway Company, now pending before the Legislature of the State of New York, becoming a law, pay or cause to be paid to the said Oliver W. Barnes, his representatives and assigns, the sum of twenty-seven thousand five hundred dollars in currency of the United States, being the amount of certain advances made and services rendered by the said Barnes to the said railway company. And also that we will cause to be delivered to the said Barnes, or his assigns, at the time of the payment of the said money, two thousand shares of the capital stock of the said railway company, which said stock is to be full paid stock.

"And we further agree with the said Oliver W. Barnes, his representatives and assigns, that in the event of the said amendments not becoming a law at the present session of the legislature, we will either cause said money to be paid and said two thousand shares of stock delivered to the said Barnes, or his assigns, or have reassigned to the said Barnes, or his assigns, the claims, demands, and rights so assigned to us, and transfer to him or his assigns the said sixty shares of stock so transferred to us the next day after the close of the present session of the Legislature of New York. And we further agree that not more than one hundred additional shares of the stock of said company shall be issued until the said payment be made and stock delivered without the consent of the said Barnes, and that so much of said one hundred shares as shall be issued shall be transferred to the said Barnes, if we do not exercise our

option of paying said twenty-seven thousand five hundred dollars, and delivering said two thousand shares on the failure of the said amendments to become a law at the present session. And we further agree that no contract for the construction of the railway of the company shall be entered into without the consent of the said Barnes, until the said money shall be paid and the stock delivered.

"In witness whereof, we have hereunto set our hands and seals, this twenty-sixth day of March, in the year one thousand eight hundred and seventy-two.

"GEORGE H. BROWN. [L. S.]
"JOSEPH SELIGMAN. [L. S.]"

When, in 1882, this action was commenced, Joseph Seligman had died, and executors of his will were joined as defendants with Brown. The alleged default was in the failure or refusal to deliver to the plaintiff the two thousand shares of the stock of the railway company, as Brown and Seligman had undertaken by the contract. The plaintiff sought to recover $200,000 and interest. The referee found that the stock had no value, and directed judgment against Brown for nominal or six cents damages; and as to the defendants, executors, the referee directed judgment of dismissal of complaint. Judgments were entered accordingly. The General Term affirmed the latter, and reversed the judgment for nominal damages, and as to the defendant Brown granted a new trial.

Further facts appear in the opinion.

John E. Parsons for appellant.

Edward C. James and *Ira Leo Bamberger* for respondent Barnes.

BRADLEY, J. The main controversy has relation to the rule or measure of damages applicable to the breach of the contract upon which this action was founded. While the plaintiff claims that damages cannot be less than $200,000 and interest, it is insisted on the part of the defence that they were only nominal. Before proceeding to the consideration of the question in that respect, reference may properly be made to the facts out of which the alleged claim arose. The New York City Central Underground Railway Company was organized under an act incorporating it and authorizing the company to construct and operate an underground railway in the city of New York, passed in 1868 and amended in 1869. The authorized capital stock of the company was $10,000,000. At the time the contract of March 26th, 1872, was made, the plaintiff was president of the company. He then had some claims against it; and only one

hundred and seventeen shares of capital stock had been issued, of which he held sixty-three shares. By the transfer of the sixty shares to Brown and Seligman, they took the control of the organization of the company. The amendments to the charter then pending in the legislature did not become a law, and consequently it was optional with them to either retain their purchase and pay, or surrender what they had received and put an end to the contract. They, however, concluded to treat it as effectual and assumed the undertaking to perform, and afterward did pay to the plaintiff the $27,500, and did deliver to the plaintiff certificates of two thousand shares of the capital stock of the company. This was apparently full performance, but in fact was not, because that so delivered was not paid stock. And when this was discovered by the plaintiff he offered to return the certificates and demanded such as he was entitled to. Further performance was refused, and this action followed. The only question as against the defendant Brown was one of damages, and the referee found that at the time when he and Seligman undertook to deliver the stock to plaintiff it had no actual or market value, and determined that he was entitled to recover nominal damages only. The stock certainly had no market value. None was in the market. This finding and conclusion were challenged by the plaintiff's exceptions. By reference to the condition of the company it is seen that the total amount of money received by it on account of subscriptions to its stock was $5700, and that was received in 1869 and 1871. The other credits to the capital stock account were in demand loans and special services rendered the company. The various efforts prior to 1872 were unsuccessfully made to raise money for the purpose of construction of the railway, and the reason why the bonds of the company could not be negotiated was that it had been unable to obtain subscriptions to its capital stock to pay for right of way. The land and consequential damages incident to the construction of the railway were estimated at $5,000,000 ; and the expenditures by the company for work done toward construction and for land and land damages did not exceed $4000. The indebtedness of the company was about $350,000. This was in general terms the situation of the company when the contract of March 26th, 1872, was made ; and it was known as well to Brown and Seligman as to the plaintiff. Whatever of value they took by the contract was in the franchise of the company, and was dependent upon the use which could be made of it by way of the construction and operation of an underground railway. While the futility of the enterprise tended to show that it never had

any actual value, there evidently was hope and expectation of success entertained by Brown and Seligman when they elected to retain the benefit of the contract, and it is in that view insisted by the plaintiff that the stock then had a value which to him may at that time have been available, although later it turned out to have had none, and, therefore, he lost whatever he may have realized by its conversion if it had in due time been delivered to him. There is apparently some force in this suggestion, but it is entirely speculative, assuming that the stock then in fact had no actual value as well as no market value. There was some conflict in the expert evidence upon the subject founded upon the situation of the company. While that on the part of the defendants was that the stock had no value, that of the witnesses called by the plaintiff was to the effect that it was as the situation then appeared, worth par. It may be observed that the plaintiff held the stock represented by the certificate so delivered to him until about September 1st, 1874, upon the assumption that it was full paid stock before his discovery that it was otherwise.

The finding of the referee that the stock had neither actual nor market value was supported by evidence, and for the purpose of this review must be deemed conclusive. But it is insisted by the learned counsel for the plaintiff that the plaintiff should nevertheless have recovered the $200,000 and interest upon it because he was entitled to the stock or to a sum which it would cost to obtain it. As a general rule, the damages which a party is entitled to recover against another for a breach of contract are such as will indemnify him for the loss he has suffered by the default. And it is with a view to that result that the rules for ascertaining and awarding damages have been adopted. The purpose of the rule in that respect is to leave the party in no worse, and place him in no better, condition than he would have been if the act or default complained of had not been committed.

It was with a view to such measure of relief, and the adoption of a rule to accomplish it, that the doctrine which gave the highest market value up to the time of the trial as the measure of damages for conversion of property of fluctuating value, as held in Markham *v.* Jaudon, 41 N. Y. 235, and some prior cases, was overruled in Baker *v.* Drake, 53 N. Y. 211, and the market value for a reasonable time within which to replace the property was adopted as furnishing the guide to the proper measure of damages and the more satisfactory means of indemnity. In that case the defendants, pursuant to an arrangement with the plaintiff, had purchased stocks to hold and carry subject to

his order, so long as he kept his margin good. The defendants disposed of the stock in violation of the agreement. And the Court there held, substantially, that an amount sufficient to indemnify a party injured for the loss, naturally, reasonably, and proximately resulting from the act complained of, and which a proper degree of prudence on the part of the complainant would not have averted, is the proper measure of recovery when punitive damages are not allowable. And that "the advance in the market price of the stock, from the time of the sale up to a reasonable time to replace it after the plaintiff received notice of the sale, would afford a complete indemnity."

The principle upon which the determination of Baker *v.* Drake rested was that the measure of the plaintiff's damages was governed by the opportunity which was afforded by the market for him within a reasonable time to replace the stock on the refusal of the defendant to do so. S. C. 66 N. Y. 518; Colt *v.* Owines, 90 N. Y. 368. And in Wright *v.* Bank of the Metropolis, 110 N. Y. 237, the same rule was held in like manner applicable where stock fully paid for by the owner is through the honest mistake of the pledgee converted by him, and he refuses to replace it. Thereupon the owner may do so within a reasonable time, and the highest market price within that time is the proper measure of damages. This is the recognized rule in this State, and it is applicable alike to actions upon contract as in tort.

In the present case there was no market to resort to for the plaintiff to supply himself with the stock, nor any market value to furnish the measure of damages. The rule applied in the cases last cited was not, therefore, in that sense applicable to the situation in the case at bar. A subscription, however, to two thousand shares of the capital stock of the railway company, and payment of the full amount to the company, would have produced the stock, and it may be assumed that it could not otherwise have been procured. It is upon that ground that the plaintiff insists that the liability of the defendant is measured by that amount. This would have been so if the agreement of Brown and Seligman had been to pay the plaintiff $200,000 in the stock of the company. Then their indebtedness or liability would not have been controlled by the value of the stock, but would have been fixed by the contract, but when the specific *quantum* of the stock was made the consideration in that respect for the plaintiff's sale to them, on their failure to deliver it, he was entitled in damages to the equivalent of that which they had undertaken to render.

In the absence of special circumstances in an action for con-

version of personal property as well as one for failure to deliver it in performance of a contract where consideration has been received, the value of the property at the time of such conversion or default, with interest, is the measure of compensation. Ormsby *v.* Vermont, etc , Co., 56 N. Y. 623 ; Parsons *v.* Sutton, 66 N. Y. 92. No special circumstances were alleged in the complaint to take this case out of the general rule. Nor was there any fluctuation in the value of the stock succeeding the time for its delivery under the contract to qualify the application of such rule.

The damages which a party ordinarily may recover for breach of contract are those which naturally flow from the default. And if the contract is made in reference to special circumstances affecting the measure of compensation, such circumstances may be treated as within the contemplation of the parties and constitute a basis for the assessment of damages. Booth *v.* Spuyten Duyvel R. M. Co., 60 N. Y. 487. They come within the meaning of special damages, and must be the subject of allegation in pleading to entitle the party to make proof of them, unless objection in that respect be waived. In the present case no facts of special character relating to damages were alleged, nor were any established by the evidence further than the mere fact that the stock of the company had no market value. If, notwithstanding that fact, the stock may have had an actual value, a different question would have been presented, for the plaintiff could not be subjected to loss, nor could the defendant be permitted to profit by the fact that the stock had no market value at the stipulated time for delivery. Then other means than those afforded by the market would be resorted to under the contract, as within the contemplation of the parties, to ascertain the amount requisite to full indemnity to the plaintiff. Sternfels *v.* Clark, 2 Hun, 122 ; 70 N. Y. 608.

There may be cases in which damages have no support in market values where the value is peculiar to the party entitled to performance, and relief will be given accordingly. Scattergood *v.* Wood, 14 Hun, 269 ; 79 N. Y. 263 ; Parsons *v.* Sutton, 66 N. Y. 92. And when the remedy at law for compensation is inadequate or impracticable, it may be found in equity by way of specific performance. Pom. Eq. Jur., § 1401. Those are supposed cases to which the principles of law adapt remedies when they arise. But in the case at bar, the stock not only had no market value, it also had no actual value. Nor does it appear that it would have been of any value to the plaintiff, or of any substantial benefit to him for any purpose if he had received it. The defendant Brown and his associate Seligman

did not by the contract undertake to do anything to give any future value to the stock of the company. Thus we have the simple case of a contract to deliver a certificate for a certain quantity of capital stock then having no existence, and when due and thereafter having no value. The claim that because the creation or issue of this worthless stock would cost its par value the plaintiff is entitled to recover that sum, does not seem to have the support of any well-defined principle of law. But it is said that with knowledge of the situation, Brown and his associate absolutely agreed to deliver the stock and, therefore, they were bound to pay the amount requisite to accomplish it without regard to the value of the stock or of its beneficial use to the plaintiff.

In an action at law to recover damages for breach of contract, the question of damages is one of indemnity. And in that respect the remedy founded upon this contract does not differ from that upon any other contract for default in the delivery of property which a party has unqualifiedly undertaken to deliver for a consideration received.

In Dana *v.* Fiedler, 12 N. Y. 40, the measure of damages for failure to deliver madder pursuant to contract, was founded upon the market value at the time of the default. The question there arose upon the exclusion of evidence, speculative in character, and which for that reason was held inadmissible upon the question of such value.

Nor does Scattergood *v.* Wood have any essential application in principle to the case at bar. In that case there was an element of exemplary damages against the defendant, who had wilfully deprived the plaintiff of the use of a test machine designed by him for a special purpose, in consequence of which he was put to the expense of constructing another for such purpose. Of this intended use the defendant was advised when he appropriated and withheld the machine from the plaintiff. The recovery of the expense of constructing the second one, as damage for the detention of the other, was sustained, although by reason (as it turned out) of its insufficiency, the value of the latter was much less than such cost.

In the present case the action is founded solely upon the failure to deliver to the plaintiff the stock without any supported claim of special circumstances for any damages other than such as flow naturally and reasonably from such default of Brown and Seligman. While the performance of their contract in that respect may have required them to pay to the company $200,000, the entire value of its performance to the plaintiff was in the stock, which they undertook to deliver to him,

and this was the only benefit he was entitled to take under that provision of the contract. The value of the stock, or its pecuniary equivalent, was the measure of his injury by the default. And as it had no value, the plaintiff was awarded complete indemnity by the conclusion of the referee that he was entitled to recover nominal damages only.

There was no error in the ruling of the referee by which evidence of value of the stock was received. The complaint alleged that on January 22d, 1873, when the plaintiff accepted the certificate before mentioned of stock in performance of the contract, the stock of the company was worth, and salable in the market at its full par or face value, and demanded judgment for that amount and interest from January 23d, 1873. This was the situation of the complaint when the evidence upon the question of value was given. And the plaintiff, upon a state of facts embraced in a hypothetical question, called upon the witnesses to state the value of the stock in January, 1873. This was the time when, by the issue tendered in the complaint and taken by the answer, the value of the stock was, by the pleadings, brought in question. And it may be observed that the assumed facts upon which the answers of the witnesses were predicated, were the same and no different at that time than they were on the day when the contract matured.

These views lead to the conclusion that, as to the defendant Brown, the judgment directed by the referee should be sustained. But as the order granting an additional allowance of costs to that defendant may be deemed to have been reversed at General Term, that disposition of the order is affirmed, and the costs recovered treated as reduced accordingly.

The contract was the joint undertaking of Brown and Seligman. The latter having died before the action was commenced, his personal representatives were joined as defendants with Brown. The complaint was as to those executors dismissed by the referee upon the ground that facts sufficient to constitute a cause of action against them were not alleged. Their testator having only the relation of joint contractor with Brown, his death placed the primary liability upon the latter, unless he was unable to pay or insolvent. Upon that fact the liability of those personal representatives to the plaintiff upon the contract was dependent, and that fact was essential to the cause of action against them. Grant *v.* Shurter, 1 Wendell, 148; Trustees, etc., Orphan House *v.* Lawrence, 11 Paige, 80; 2 Denio, 577; People *v.* Cole, 55 N. Y. 124, and cases there cited; Hauck *v.* Craighead, 67 N. Y. 432. It was not alleged. This defect was available by objection, which was taken at the trial. Code, § 499.

It does not appear on what ground the motion to amend the complaint was denied. The plaintiff was not entitled to it as matter of right. And the discretionary power of the referee, exercised in denying the amendment, is not the subject of review here.

The judgment in favor of the defendant Seligman, as modified by the General Term, should be affirmed. And the order reversing the judgment and granting a new trial, as against defendant Brown, should be reversed, and the judgment entered upon the report of the referee (after deducting therefrom the amount of the additional allowance of costs) affirmed.

All concur.

Judgment accordingly.

HADLEY AND ANOTHER *v.* BAXENDALE AND OTHERS.

IN THE EXCHEQUER, FEBRUARY 23, 1854.

[*Reported in* 9 *Exchequer* 341.]

THE first count of the declaration stated that, before and at the time of the making by the defendants of the promises hereinafter mentioned, the plaintiffs carried on the business of millers and mealmen in copartnership, and were proprietors and occupiers of the City Steam Mills, in the city of Gloucester, and were possessed of a steam-engine, by means of which they worked the said mills, and therein cleaned corn, and ground the same into meal, and dressed the same into flour, sharps, and bran, and a certain portion of the said steam-engine, to wit, the crank-shaft of the said steam-engine, was broken and out of repair, whereby the said steam-engine was prevented from working, and the plaintiffs were desirous of having a new crank-shaft made for the said mill, and had ordered the same of certain persons trading under the name of W. Joyce & Co., at Greenwich, in the county of Kent, who had contracted to make the said new shaft for the plaintiffs; but before they could complete the said new shaft it was necessary that the said broken shaft should be forwarded to their works at Greenwich, in order that the said new shaft might be made so as to fit the other parts of the said engine which were not injured, and so that it might be substituted for the said broken shaft; and the plaintiffs were desirous of sending the said broken shaft to the said W. Joyce & Co. for the purpose aforesaid; and the de-

fendants, before and at the time of the making of the said promises, were common carriers of goods and chattels for hire from Gloucester to Greenwich, and carried on such business of common carriers, under the name of "Pickford & Co.;" and the plaintiffs, at the request of the defendants, delivered to them as such carriers the said broken shaft, to be conveyed by the defendants as such carriers from Gloucester to the said W. Joyce & Co., at Greenwich, and there to be delivered for the plaintiffs on the second day after the day of such delivery, for reward to the defendants; and in consideration thereof the defendants then promised the plaintiffs to convey the said broken shaft from Gloucester to Greenwich, and there on the said second day to deliver the same to the said W. Joyce & Co. for the plaintiffs. And although such second day elapsed before the commencement of this suit, yet the defendants did not nor would deliver the said broken shaft at Greenwich on the said second day, or to the said W. Joyce & Co. on the said second day, but wholly neglected and refused so to do for the space of seven days after the said shaft was so delivered to them as aforesaid.

The second count stated that, the defendants being such carriers as aforesaid, the plaintiffs, at the request of the defendants, caused to be delivered to them as such carriers the said broken shaft, to be conveyed by the defendants from Gloucester aforesaid to the said W. Joyce & Co., at Greenwich, and there to be delivered by the defendants for the plaintiffs, within a reasonable time in that behalf, for reward to the defendants; and in consideration of the premises in this count mentioned, the defendants promised the plaintiffs to use due and proper care and diligence in and about the carrying and conveying the said broken shaft from Gloucester aforesaid to the said W. Joyce & Co., at Greenwich, and there delivering the same for the plaintiff in a reasonable time then following for the carriage, conveyance, and delivery of the said broken shaft as aforesaid; and although such reasonable time elapsed long before the commencement of this suit, yet the defendants did not nor would use due or proper care or diligence in or about the carrying or conveying or delivering the said broken shaft as aforesaid, within such reasonable time as aforesaid, but wholly neglected and refused so to do; and by reason of the carelessness, negligence, and improper conduct of the defendants, the said broken shaft was not delivered for the plaintiffs to the said W. Joyce & Co., or at Greenwich, until the expiration of a long and unreasonable time after the defendants received the same as aforesaid, and after the time when the same should have

been delivered for the plaintiffs ; and by reason of the several premises, the completing of the said new shaft was delayed for five days, and the plaintiffs were prevented from working their said steam-mills, and from cleaning corn, and grinding the same into meal, and dressing the meal into flour, sharps, or bran, and from carrying on their said business as millers and mealmen for the space of five days beyond the time that they otherwise would have been prevented from so doing, and they thereby were unable to supply many of their customers with flour, sharps, and bran during that period, and were obliged to buy flour to supply some of their other customers, and lost the means and opportunity of selling flour, sharps, and bran, and were deprived of gains and profits which otherwise would have accrued to them, and were unable to employ their workmen, to whom they were compelled to pay wages during that period, and were otherwise injured, and the plaintiffs claim £300.

The defendants pleaded *non assumpserunt* to the first count ; and to the second payment of £25 into court in satisfaction of the plaintiffs' claim under that count. The plaintiffs entered a *nolle prosequi* as to the first count ; and as to the second plea, they replied that the sum paid into court was not enough to satisfy the plaintiffs' claim in respect thereof ; upon which replication issue was joined.

At the trial before Crompton, J , at the last Gloucester Assizes, it appeared that the plaintiffs carried on an extensive business as millers at Gloucester ; and that, on May 11th, their mill was stopped by a breakage of the crank-shaft by which the mill was worked. The steam-engine was manufactured by Messrs. Joyce & Co., the engineers, at Greenwich, and it became necessary to send the shaft as a pattern for a new one to Greenwich. The fracture was discovered on the 12th, and on the 13th the plaintiffs sent one of their servants to the office of the defendants, who are the well-known carriers trading under the name of Pickford & Co., for the purpose of having the shaft carried to Greenwich. The plaintiffs' servant told the clerk that the mill was stopped, and that the shaft must be sent immediately ; and in answer to the inquiry when the shaft would be taken, the answer was, that if it was sent up by 12 o'clock any day, it would be delivered at Greenwich on the following day. On the following day the shaft was taken by the defendants, before noon, for the purpose of being conveyed to Greenwich, and the sum of £2 4*s.* was paid for its carriage for the whole distance ; at the same time the defendants' clerk was told that a special entry, if required, should be made to hasten its delivery. The delivery of the shaft at Greenwich was de-

layed by some neglect; and the consequence was, that the plaintiffs did not receive the new shaft for several days after they would otherwise have done, and the working of their mill was thereby delayed, and they thereby lost the profits they would otherwise have received.

On the part of the defendants it was objected that these damages were too remote, and that the defendants were not liable with respect to them. The learned judge left the case generally to the jury, who found a verdict with £25 damages beyond the amount paid into court.

Whateley, in last Michaelmas Term, obtained a rule *nisi* for a new trial, on the ground of misdirection.

Keating and *Dowdeswell* showed cause.

Whateley, *Willes*, and *Phipson* in support of the rule.

The judgment of the Court was now delivered by

ALDERSON, B. We think that there ought to be a new trial in this case, but in so doing, we deem it to be expedient and necessary to state explicitly the rule which the judge, at the next trial, ought, in our opinion, to direct the jury to be governed by when they estimate the damages.

It is, indeed, of the last importance that we should do this, for if the jury are left without any definite rule to guide them, it will, in such cases as these, manifestly lead to the greatest injustice. The courts have done this on several occasions; and, in Blake *v.* Midland Railway Company, 21 L. J., Q. B. 237, the Court granted a new trial on this very ground, that the rule had not been definitely laid down to the jury by the learned judge at *nisi prius*.

"There are certain established rules," this Court says, in Alder *v.* Keighley, 15 M. & W. 117, "according to which the jury ought to find." And the Court, in that case, adds: "And here there is a clear rule, that the amount which would have been received if the contract had been kept, is the measure of damages if the contract is broken."

Now we think the proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally —that is, according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the

defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case ; and of this advantage it would be very unjust to deprive them. Now the above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract. It is said that other cases, such as breaches of contract in the non-payment of money, or in the not making a good title to land, are to be treated as exceptions from this, and as governed by a conventional rule. But as, in such cases, both parties must be supposed to be cognizant of that well-known rule, these cases may, we think, be more properly classed under the rule above enunciated as to cases under known special circumstances, because there both parties may reasonably be presumed to contemplate the estimation of the amount of damages according to the conventional rule. Now, in the present case, if we are to apply the principles above laid down, we find that the only circumstances here communicated by the plaintiffs to the defendants at the time the contract was made, were, that the article to be carried was the broken shaft of a mill, and that the plaintiffs were the millers of that mill. But how do these circumstances show reasonably that the profits of the mill must be stopped by an unreasonable delay in the delivery of the broken shaft by the carrier to the third person ? Suppose the plaintiffs had another shaft in their possession put up or putting up at the time, and that they only wished to send back the broken shaft to the engineer who made it ; it is clear that this would be quite consistent with the above circumstances, and yet the unreasonable delay in the delivery would have no effect upon the intermediate profits of the mill. Or, again, suppose that, at the time of the delivery to the carrier, the machinery of the mill had been in other respects defective, then also the same results would follow. Here it is true that the shaft was actually sent back to serve as a model for a new one, and that the want of a new one was the only cause of the

stoppage of the mill, and that the loss of profits really arose from not sending down the new shaft in proper time, and that this arose from the delay in delivering the broken one to serve as a model. But it is obvious that, in the great multitude of cases of millers sending off broken shafts to third persons by a carrier under ordinary circumstances, such consequences would not, in all probability, have occurred ; and these special circumstances were here never communicated by the plaintiffs to the defendants. It follows, therefore, that the loss of profits here cannot reasonably be considered such a consequence of the breach of contract as could have been fairly and reasonably contemplated by both the parties when they made this contract. For such loss would neither have flowed naturally from the breach of this contract in the great multitude of such cases occurring under ordinary circumstances, nor were the special circumstances, which, perhaps, would have made it a reasonable and natural consequence of such breach of contract, communicated to or known by the defendants. The judge ought, therefore, to have told the jury that, upon the facts then before them, they ought not to take the loss of profits into consideration at all in estimating the damages. There must, therefore, be a new trial in this case.

Rule absolute.

THE ROCHESTER LANTERN COMPANY, RESPONDENT, *v.* THE STILES & PARKER PRESS COMPANY, APPELLANT.

IN THE COURT OF APPEALS OF NEW YORK, OCTOBER 4, 1892.

[*Reported in* 135 *New York Reports* 209.]

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made November 20th, 1891, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

This action was brought to recover damages for alleged breach of contract.

The facts, so far as material, are stated in the opinion.

Theodore Bacon for appellant.

William Nathaniel Coggswell for respondent.

EARL, C.J. The defendant brings this appeal without having made a case containing any of the evidence and relies solely upon exceptions contained in or annexed to the judgment roll

as provided in §§ 994 and 997 of the Code. We do not know what the evidence upon the trial was, except as we are informed by the findings of facts.

The defendant does not complain of the findings of facts made by the referee, but it finds fault with his rulings upon matters of law, and the sole question before us is whether the rulings are justified by the facts found. In other words, do the facts found justify the judgment ?[1]

Therefore, in disposing of this case, we must take the facts as found by the referee, and they are as follows : On March 19th, 1887, James H. Kelly entered into a contract with the defendant whereby it was to make and deliver to him certain dies to be used by him in the manufacture of lanterns ; that it agreed to make and deliver the dies within a reasonable time— that is, within five weeks from the time of the order, to manufacture and deliver the same ; that the plaintiff was incorporated shortly prior to August 27th, 1887, and on the 29th day of that month Kelly duly assigned to the plaintiff his contract with the defendant, and all his rights and claims thereunder ; that the plaintiff failed to establish by evidence that at or prior to the time of making the contract, the defendant was informed that any corporation was intended to be organized, or that the contract was made for the use or benefit of any other person or corporation than Kelly ; that the first notification received by the defendant that the plaintiff had any interest in the contract, or that such a corporation as the plaintiff existed, so far as was proven upon the trial, was given to it by a letter dated March 22d, 1888, and signed " Rochester Lantern Company, by James H. Kelly, President ;" that from time to time after making the contract samples were sent by Kelly to the defendant and dies were shipped to him by the defendant ; that the last sample for the last die to be made was sent by Kelly to the defendant on July 29th, 1887 ; that by the conduct of Kelly and the defendant performance of the contract within the time originally stipulated was waived, and the contract except as to time of performance was regarded as still in force at the date of the assignment thereof ; that a reasonable time in which the defendant could have carried out and performed the contract after August 29th, 1889, was five weeks, which expired October 3d ; that Kelly was a manufacturer of lanterns in Rochester and required the dies for the manufacture of lanterns which he designed to put upon the market as the defendant was informed and well knew, and that the plaintiff after its incorporation suc-

[1] A portion of the opinion discussing a question of practice has been omitted.—ED.

ceeded him in the business of manufacturing lanterns ; that the defendant failed to carry out the contract and to furnish dies as thereby required ; that the plaintiff for the sole purpose of carrying on the business of manufacturing the lanterns which it was intended that these dies should make, entered into certain obligations and incurred certain liabilities as follows : It paid one Butts for rent of room from October 3d to November 1st, 1887, the sum of $31.86 ; it paid one Broad, an employé, for his wages from October 3d, 1887, to March 24th, 1888, the sum of $250, and one Briston, an employé, for his wages during the same time the same sum ; it paid to Crouch & Sons for the rent of premises from November 1st, 1887, to March 24th, 1888, $278.46 ; that by reason of defendant's failure to perform the contract as agreed by it the plaintiff was unable to manufacture any lanterns for the market until after the commencement of this action on March 24th, 1888, and that the plaintiff by reason of such failure sustained loss in the sums above mentioned which it actually paid, and the referee awarded judgment for the amount of the items above specified.

We do not think these facts sufficient to justify the recovery of the items of damages specified. There had been no breach of the contract at the time of the assignment thereof to the plaintiff, and at that time Kelly had no claim against the defendant for damages. After the assignment Kelly had no interest in the contract, and the defendant owed him no duty and could come under no obligation to him for damages on account of a breach of the contract by it. There is no doubt that Kelly could assign this contract as he could have assigned any other chose in action, and by the assignment the assignee became entitled to all the benefits of the contract. Devlin *v.* Mayor, etc., 63 N. Y. 8. The contract was not purely personal in the sense that Kelly was bound to perform in person, as his only obligation was to pay for the dies when delivered, and that obligation could be discharged by any one. He could not, however, by the assignment, absolve himself from all obligations under the contract. The obligations of the contract still rested upon him, and resort could still be made to him for the payment of the dies in case the assignee did not pay for them when tendered to it. After the assignment of the contract to the plaintiff the defendant's obligation to perform still remained, and that obligation was due to the plaintiff, and for a breach of the obligation it became entitled to some damages, and so we are brought to the measure of damages in such a case as this.

It is frequently difficult in the administration of the law to

apply the proper rule of damages, and the decisions upon the subject are not harmonious. The cardinal rule undoubtedly is that the one party shall recover all the damage which has been occasioned by the breach of the contract by the other party. But this rule is modified in its application by two others: The damages must flow directly and naturally from the breach of the contract, and they must be certain, both in their nature and in respect of the cause from which they proceeded. Under this latter rule speculative, contingent, and remote damages which cannot be directly traced to the breach complained of are excluded. Under the former rule such damages only are allowed as the parties may fairly be supposed when they made the contract to have contemplated as naturally following its violation. Hadley *v.* Baxendale, 9 Excheq. 341; Griffin *v.* Colver, 16 N. Y. 489; Leonard *v.* N. Y., etc., Tel. Co., 41 N. Y. 544, 566; Cassidy *v.* Le Fevre, 45 N. Y. 562.

The natural and obvious consequence of a breach of this contract on the part of the defendant would be to compel Kelly or his assignee to procure the dies from some other manufacturer, and the increased cost of the dies, if any, would be the natural and ordinary measure of the damages; and such would be the damages which it could be fairly supposed the parties expected, when they made the contract, would flow from a breach thereof. It does not appear that Kelly was engaged in the manufacture of lanterns when the contract was made, or that he contemplated engaging in the business until dies were furnished. No fact is found showing that the defendant had any reason to suppose that he would hire any workmen or persons before the dies were furnished, and it cannot be said that it was a natural and proximate consequence of a breach of the contract that he would have idle men or unused real estate causing him the expenses now claimed. Much less can it be supposed that the defendant could, when the contract was made, anticipate that the contract would be assigned, and that the assignee would employ men and premises to remain idle after the defendant had failed to perform the contract and in consequence of such failure. Such damages to the assignee could not have been contemplated as the natural and proximate consequence of a breach of the contract. If we should adopt the rule of damages contended for by the plaintiff, what would be the limits of its application? Suppose instead of employing two men the plaintiff had projected an extensive business in which the dies were to be used, and had employed one hundred men, and had hired or even constructed a large and costly building in which to carry on the business, and had kept the men and the building

unemployed for months and, perhaps, years, could the whole expense of the men and building be visited on the defendant as a consequence of its breach of contract? If it could we should have a rule of damages which might cause ruin to parties unable from unforeseen events to perform their contracts.

The damages allowed by the referee in this case are special damages, not flowing naturally from the breach of the contract, and, we think, the only damages such an assignee in a case like this can recover is the difference between the contract price of these dies and the value or cost of the dies if furnished according to the contract. Even if Kelly could have recovered special damages, we see no ground for holding that his assignee, of whose connection with the contract the defendant had no notice, could recover special damages not contemplated when the contract was made. We are therefore of opinion that the award of damages made by this judgment was not justified by the facts found, and that the judgment should be reversed and a new trial granted, costs to abide event.

All concur.

D. F. GIBBONS *v.* OLE O. BENTE.

IN THE SUPREME COURT OF MINNESOTA, FEBRUARY 23, 1892.

[*Reported in* 51 *Minnesota* 499.]

APPEAL by defendant, Ole O. Bente, from an order of the District Court of Stearns County, Searle, J., made August 24th, 1891, denying a new trial.

The plaintiff, D. F. Gibbons, brought this action to recover of defendant $100 and interest. The complaint stated that D. J. Davis and Thomas Rankin on September 17th, 1890, at Brooten, Minn., agreed to build at that place in ninety days or thereabout a combined creamery and cheese factory for defendant and others, and that in consideration thereof defendant agreed to pay them $100, one third in cash, one third in sixty days, and the residue in four months after its completion. That Davis & Rankin performed on their part prior to November 1st, 1890, and assigned their claim to plaintiff, and that defendant failed to pay the $100, or any of it. A copy of the contract was attached to the complaint.

The defendant answered that he was a Norwegian, unable to read English; that plaintiff, as agent of Davis & Rankin, procured his subscription to the contract by representing that it

was only an agreement to take $100 stock in a corporation to be organized, and that the stockholders would determine at a meeting whether they would build a creamery ; that he attended the meeting of the subscribers, and it was there resolved and decided by a majority, not to incorporate or build a creamery ; that plaintiff was present and had notice of the decision ; that defendant then and there refused to perform the contract on his part and notified plaintiff. The defendant also answered that he was not severally liable upon the contract, and that the other subscribers were necessary parties.

The action was tried June 22d, 1891. The Court instructed the jury to return a verdict for plaintiff for $103.95. Defendant excepted and moved for a new trial, but was refused. The following is a copy of the contract, viz.:

" We, Davis & Rankin, party of the first part, agree with the undersigned subscribers hereto, party of the second part, to build, erect, complete, and equip for said party of the second part, a combined butter and cheese factory, at or near Brooten, Stearns County, Minn., as follows, to wit (describing it and the machinery) :

" The parties of the second part hereby agree to furnish suitable lands for said buildings, together with sufficient water on said lot for the use of the business, and they shall be credited therefor, as a payment on this contract, the sum of $200 ; and it is further understood that in case the said second party shall fail to furnish said land and water within ten days after the execution of this contract, then the said Davis & Rankin at their option may furnish said land and water.

" Davis & Rankin further agree to provide and keep hired, at the expense of the stockholders, an experienced butter and cheese maker for one year, if desired.

" Said Davis & Rankin agree to erect said butter and cheese factory as set forth by the above specifications for $6500, payable in cash, one third when completed and one third in sixty days, and one third in four months after completion.

" We, the subscribers hereto, agree to pay the above amount for said butter and cheese factory when completed. Said building to be completed within ninety days or thereabout after the above amount ($6500) is subscribed. All subscriptions to this contract to bear interest at the rate of 8 per cent per annum from date of completion until paid.

" As soon as the above amount of $6500 is subscribed, or in a reasonable time thereafter, the said subscribers agree to incorporate under the laws of the State, as therein provided, fixing the aggregate amount of stock at not less than $6500, to be

divided into shares of $100 each. Said share or shares, as above stated, to be issued to the subscribers hereto in proportion to their paid-up interest herein.

"It is further distinctly understood by and between the parties hereto that if the subscriptions hereto shall amount to more than $6500 and less than $7000 then the foregoing agreement, designated as 'Contract B,' shall constitute the agreement between the parties.

"For the faithful and full performance of our respective parts of the above contract, we bind ourselves, our heirs, executors, administrators and assigns. Executed and dated this 17th day of September, 1890."

T. T. Ofsthun, *D. C. Van Camp*, and *Jenkins & Treat* for appellant.

D. Wilcox and *Taylor*, *Calhoun & Rhodes* for respondent.

COLLINS, J. The contract out of which this litigation arises was an executory one, entered into by Davis & Rankin, of the first part (by plaintiff, who was then their agent, and has succeeded to their rights under the contract by assignment), and defendant, with some sixty other persons, as parties of the second part. In it the parties of the first part agreed to erect and complete a butter and cheese factory for those of the second part within ninety days after the amount of the contract price had been obtained by subscription, the scheme being to secure subscribers to the stock of a corporation in shares of $100 each; and the parties of the second part agreed to pay the contract price in three instalments, commencing upon the completion. The defendant subscribed for one share, and is sued for the sum of $100. Without stopping to consider other points referred to by counsel for appellant, we proceed to an examination of one which goes directly to respondent's right to maintain an action for any part of the contract price as such, although the factory has been completed in accordance with the terms of the contract. It was undisputed that soon after it was entered into, but before Davis & Rankin had commenced to perform, a meeting of those who had signed as parties of the second part was held. The plaintiff attended and participated. At this meeting a large majority of those present—defendant being of the number—voted and determined that they would go no further in the enterprise, and that the factory should not be built.

The plaintiff was then and there notified not to erect the factory, and to proceed no further under the contract. He responded in somewhat vigorous language, and declared that the factory should be erected inside of two weeks. As agent of Davis & Rankin, he then proceeded to erect and equip the

plant. Defendant and others refused to accept it when completed, or to pay. The question is as to the power of the parties of the second part to repudiate and arbitrarily break their contract, by refusing to perform, and by renouncing all liability under it, and thereby prevent Davis & Rankin from recovering the full contract price, should they disregard the breach and fully perform on their part. There seems to be no room for doubt upon this subject.

While a contract is executory a party has the power to stop performance on the other side by an explicit direction to that effect, subjecting himself to such damages as will compensate the other party for being stopped in the performance on his part at that stage in the execution of the contract. The party thus forbidden cannot afterward go on, and thereby increase the damages, and then recover such damages of the other party. Danforth *v.* Walker, 37 Vt. 239; Clark *v.* Marsiglia, 1 Denio, 317; Butler *v.* Butler, 77 N. Y. 472; Collins *v.* Delaporte, 115 Mass. 159.

The question is very fully considered in the recent case of Davis *v.* Bronson, 2 N. Dak. 300 (50 N. W. Rep. 836), in which cases other than those above noted are referred to.

The legal right, on general principles, of either party, to violate, abandon, or renounce his contract, on the usual terms of compensation to the other for the damages which the law recognizes and allows—subject to the jurisdiction of equity to decree specific performance in proper cases—is universally recognized and acted upon. Among the many authorities which might be cited on this, see Bish. Cont. § 837; Leake, Cont. 868, 1044; 1 Suth. Dam. 113; 2 Suth. Dam. 193, 526; Hinckley *v.* Pittsburgh Bessemer Steel Co., 121 U. S. 264; American Life Insurance Co. *v.* McAden, 109 Pa. St. 399 (1 Atl. Rep. 256); Frost *v.* Knight, L. R. 7 Exch. 112; Roper *v.* Johnson, L. R. 8 C. P. 167; Laird *v.* Pim, 7 Mees. & W. 474; Hochster *v.* De la Tour, 2 El. & Bl. 678.

From an examination of the adjudged cases just cited, it will be seen that ordinarily the party who is willing to abide by an executory contract may treat it as subsisting up to the time when performance should commence, for the purpose of insisting that the other party, who has previously repudiated it, shall then and finally determine whether he will comply with its terms, or persist in his resolution not to perform upon his part. But the party who has not broken his compact is not allowed to treat it as in force, for the purpose of performing in direct opposition to the refusal of the other to abide by its terms, and then enforce the payment of the contract price. One reason

for this is found in the general rule that a person who has been injured by a breach of contract must put forth reasonable exertion to render the injury as light as possible. He cannot negligently or wilfully allow the damages to be unnecessarily enhanced ; or, if he does, the increased loss falls upon him.

GILFILLAN, C.J., absent (sick), took no part.

Order reversed.

UNITED STATES *v.* BEHAN.

IN THE SUPREME COURT OF THE UNITED STATES, FEBRUARY 4, 1884.

[*Reported in* 110 *United States Reports* 338.]

THE case is stated in the opinion of the Court.

Solicitor-General (*John S. Blair* with him) for appellant.

J. W. Douglass for appellee.

BRADLEY, J., delivered the opinion of the Court.

Behan, the appellee and claimant, filed a petition in the Court below, setting forth that on December 26th, 1879, one John Roy entered into a contract with C. W. Howell, major of engineers of the United States Army, to make certain improvements in the harbor of New Orleans (describing the same), and that the claimant and two other persons named became bondsmen for the faithful performance of the work ; that on February 10th, 1881, the contract with Roy was annulled by the engineer office, and the bondsmen were notified that they had a right to continue the work under the contract if they desired to do so, and that the claimant complied with this suggestion and undertook the work ; that he went to great expense in providing the requisite machinery, materials, and labor for fulfilling the contract, but that in September, 1881, it being found, by the report of a board of engineers, that the plan of improvement was a failure, without any fault of the claimant, the work was ordered to cease ; that thereupon the claimant stopped all operations, and disposed of the machinery and materials on hand upon the best terms possible, and sent to the War Department an account of his outlay and expenses, and the value of his own time, claiming as due to him, after all just credits and offsets, the sum of $36,347.94, for which sum he prayed judgment.

The claimant afterward filed an amended petition, in which the various transactions, and his operations under the contract, were set forth in greater detail, showing among other things,

that the amount of his expenses for machinery and tools, for materials, and for labor and operations carried on, after deducting the proceeds realized from the sale of the plant remaining when the work was suspended, amounted to the sum of $33,192.90. The petition further alleged that the claimant could have completed the work contemplated by the contract by a further expense of $10,000, and that the amount which would then have been due therefor would have been $52,000, leaving a profit to him of $8807.10.

The petition concluded as follows :

" Your petitioner therefore respectfully shows that his reasonable and necessary expenditures upon the work above described amounted to $33,192.90, which sum represents the losses actually sustained by petitioner by reason of the defendants' breach of the contract. And petitioner further sets forth that the reasonable and legitimate profits which he might have obtained but for the said breach of contract may be properly computed at $8807.10, assuming $52,000 as the amount to be paid for the completed work. And petitioner further shows that he has not received one dollar from the defendants on account of said work, but that his claim and accompanying accounts, presented to the Engineer Department, have been transmitted to this Court by the Secretary of War.

" Your petitioner therefore alleges that he is entitled to receive from the United States the sum of forty-two thousand dollars ($42,000) over and above all just credits and offsets. Wherefore he prays judgment for that amount."

The Court of Claims found the material facts to be substantially as stated in the petition. The contract of Roy is set forth in full in the findings, from which it appears that the contracting party was required to furnish and lay down an artificial covering of cane-mats over the sloping portion of the river-bed of the Mississippi in front of the Third District of New Orleans, to extend outward to a depth in the river not exceeding 100 feet, and to be paid therefor at the rate of 65 cents per square yard. The Court finds that Roy prosecuted the work under the contract during the year 1880, but his progress not being satisfactory to the engineer officers, the contract was formally annulled, and the bondsmen notified as stated in the petition. In March, 1881, Behan, the claimant, gave notice to Major Howell that he would undertake the work, and at his request the major gave him a description of the work to be done, estimated as not exceeding 77,000 or 80,000 square yards, which, at the contract price, would amount to from $50,000 to $52,000. The Court further finds as follows :

"The contract was of such a character as to require extensive preparations and a large initial expenditure. The claimant made the necessary preparations for carrying on the work to completion and in procuring boats, tools, materials, and apparatus for its prosecution. He engaged actively in carrying out the contract on his part, incurred large expenditure for labor and materials, and had for some time proceeded with the work when the undertaking was abandoned by the defendants and the work stopped without fault of the claimant, as set forth in the following letters."

Then follows a copy of correspondence between the officers and the Department of Engineers, showing that a board of engineer officers was appointed to examine and report upon the plan of improvement under which the work of the claimant was being carried on, and that this board, on September 23d, 1881, reported their unanimous opinion that the object sought to be accomplished by the improvement had not been attained, and that under the then existing plan of operations, it could not be attained. On September 29th, 1881, the claimant received notice to discontinue the work, which he did at once, and gave Major Howell notice to that effect, and called his attention to the exposed situation of the machinery, materials, and other property on hand, and requested instructions respecting the same. No instructions appear to have been given. The Court then finds as follows:

"The claimant thereupon closed up his work and sold the materials which he had on hand. Nothing has been paid to him for work, materials, or losses.

"The actual and reasonable expenditures by the claimant in the prosecution of his work, together with his unavoidable losses on the materials on hand at the time of the stoppage by the defendants, were equal to the full amount claimed therefor in his petition, $33,192.20.

"It does not appear from the evidence thereon on the one side and the other whether or not the claimant would have made any actual profit over and above expenditures, or would have incurred actual loss had he continued the work to the end and been paid the full contract price therefor.

"CONCLUSION OF LAW.

"Upon the foregoing findings of facts the Court decides as a conclusion of law that the claimant is entitled to recover the sum of $33,192.20."

The Government has appealed from this decree and complains of the rule of damages adopted by the Court below. Counsel

contend that, by making a claim for profits, the claimant asserts the existence of the contract as opposed to its rescission ; and that in such case, the rule of damages, as settled in Speed's Case, 8 Wall. 77, is "the difference between the cost of doing the work and what claimants were to receive for it, making reasonable reduction for the less time engaged, and for release from the care, trouble, risk, and responsibility attending a full execution of the contract." And when such a claim is made, they contend that the burden of proof is on the claimant to show what the profits would have been ; and as the Court of Claims expressly finds that it does not appear from the evidence whether or not the claimant would have made any profits, or would have incurred loss, therefore the claimant was not entitled to judgment for any amount whatever.

The manner in which this subject was viewed by the Court of Claims is shown by the following extract from its opinion :

"Whatever rule may be adopted in calculating the damages to a contractor when, without his fault, the other party, during its progress, puts an end to the contract before completion, the object is to indemnify him for his losses sustained and his gains prevented by the action of the party in fault, viewing these elements with relation to each other. The profits and losses must be determined according to the circumstances of the case and the subject-matter of the contract. The reasonable expenditures already incurred, the unavoidable losses incident to stoppage, the progress attained, the unfinished part, and the probable cost of its completion, the whole contract price, and the estimated pecuniary result, favorable or unfavorable to him, had he been permitted or required to go on and complete his contract, may be taken into consideration. Sickels' Case, 1 C. Cls. R. 214 ; Speed's Case, 2 C. Cls. R. 429 ; affirmed on appeal, 8 Wall. 77, and 7 C. Cls. R. 93 ; Wilder's Case, 5 C. Cls. R. 468 ; Bulkley's Case, 7 C. Cls. R. 543 ; 19 Wall. 37 ; and 9 C. Cls. R. 81 ; Parish's Case, 100 U. S. 500 ; Field's Case, 16 C. Cls. R. 434 ; Moore & Krone's Case, 17 C. Cls. R. 17 ; Power's Case, 18 C. Cls. R. 493 ; Masterson v. Mayor, etc., of Brooklyn, 7 Hill, 61.

"The amount of the claimant's unavoidable expenditures and losses already incurred are set forth in the findings. But we can give him nothing on account of prospective profits, because none have been proved. So for the same reason, we can deduct nothing from his expenditures on account of prospective losses which he might have incurred had he not been relieved from completing his contract. This leaves his expenditures as the only damages proved to have resulted to him from the defend-

ants' breach of contract, and they are, therefore, the proper measure of damages under all the circumstances of the case."

We think that these views, as applied to the case in hand, are substantially correct. The claimant has not received a dollar, either for what he did, or for what he expended, except the proceeds of the property which remained on his hands when the performance of the contract was stopped. Unless there is some artificial rule of law which has taken the place of natural justice in relation to the measure of damages, it would seem to be quite clear that the claimant ought at least to be made whole for his losses and expenditures. So far as appears, they were incurred in the fair endeavor to perform the contract which he assumed. If they were foolishly or unreasonably incurred, the Government should have proven this fact. It will not be presumed. The Court finds that his expenditures were reasonable. The claimant might also have recovered the profits of the contract if he had proven that any direct, as distinguished from speculative, profits would have been realized. But this he failed to do; and the Court below very properly restricted its award of damages to his actual expenditures and losses.

The *prima facie* measure of damages for the breach of a contract is the amount of the loss which the injured party has sustained thereby. If the breach consists in preventing the performance of the contract, without the fault of the other party, who is willing to perform it, the loss of the latter will consist of two distinct items or grounds of damage—namely, first, what he has already expended toward performance (less the value of materials on hand); secondly, the profits that he would realize by performing the whole contract. The second item, profits, cannot always be recovered. They may be too remote and speculative in their character, and therefore incapable of that clear and direct proof which the law requires. But when, in the language of Nelson, C.J., in the case of Masterson *v.* Mayor of Brooklyn, 7 Hill, 69, they are "the direct and immediate fruits of the contract," they are free from this objection; they are then "part and parcel of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfilment of any other stipulation." Still, in order to furnish a ground of recovery in damages, they must be proved. If not proved, or if they are of such a remote and speculative character that they cannot be legally proved, the party is confined to his loss of actual outlay and expense. This loss, however, he is clearly entitled to recover in all cases, unless

the other party, who has voluntarily stopped the performance of the contract, can show the contrary.

The rule as stated in Speed's Case is only one aspect of the general rule. It is the rule as applicable to a particular case. As before stated, the primary measure of damages is the amount of the party's loss ; and this loss, as we have seen, may consist of two heads or classes of damage—actual outlay and anticipated profits. But failure to prove profits will not prevent the party from recovering his losses for actual outlay and expenditure. If he goes also for profits, then the rule applies as laid down in Speed's Case, and his profits will be measured by "the difference between the cost of doing the work and what he was to receive for it," etc. The claimant was not bound to go for profits, even though he counted for them in his petition. He might stop upon a showing of losses. The two heads of damage are distinct, though closely related. When profits are sought a recovery for outlay is included and something more. That something more is the profits. If the outlay equals or exceeds the amount to be received, of course there can be no profits.

When a party injured by the stoppage of a contract elects to rescind it, then, it is true, he cannot recover any damages for a breach of the contract, either for outlay or for loss of profits ; he recovers the value of his services actually performed as upon a *quantum meruit*. There is then no question of losses or profits. But when he elects to go for damages for the breach of the contract, the first and most obvious damage to be shown is, the amount which he has been induced to expend on the faith of the contract, including a fair allowance for his own time and services. If he chooses to go further, and claims for the loss of anticipated profits, he may do so, subject to the rules of law as to the character of profits which may be thus claimed. It does not lie, however, in the mouth of the party, who has voluntarily and wrongfully put an end to the contract, to say that the party injured has not been damaged at least to the amount of what he has been induced fairly and in good faith to lay out and expend (including his own services), after making allowance for the value of materials on hand ; at least it does not lie in the mouth of the party in fault to say this, unless he can show that the expenses of the party injured have been extravagant, and unnecessary for the purpose of carrying out the contract.

It is unnecessary to review the authorities on this subject. Some of them are referred to in the extract made from the opinion of the Court below ; others may be found referred to

in Sedgwick on the Measure of Damages, in Smith's Leading Cases, Vol. II., p. 36, etc. (notes to Cutter *v.* Powell) ; Addison on Contracts, §§ 881, 897. The cases usually referred to, and which, with many others, have been carefully examined, are Planché *v.* Colburn, 5 C. & P. 58 ; S. C. 8 Bing. 14 ; Masterson *v.* Mayor, etc., of Brooklyn, 7 Hill (N. Y.), 61 ; Goodman *v.* Pocock, 15 A. & E. 576 ; Hadley *v.* Baxendale, 9 Excheq. 341 ; Fletcher *v.* Tayleur, 17 C. B. 21 ; Smeed *v.* Ford, 1 El. & El. 602 ; Inchbald *v.* Western, etc., Coffee Company, 17 C. B. N. S. 733 ; Griffen *v.* Colver, 16 N. Y. 489 ; and the case of United States *v.* Speed, before referred to.

It is to be observed that when it is said in some of the books, that where one party puts an end to the contract, the other party cannot sue on the contract, but must sue for the work actually done under it, as upon a *quantum meruit*, this only means that he cannot sue the party in fault upon the stipulations contained in the contract, for he himself has been prevented from performing his own part of the contract upon which the stipulations depend. But surely, the wilful and wrongful putting an end to a contract, and preventing the other party from carrying it out, is itself a breach of the contract for which an action will lie for the recovery of all damage which the injured party has sustained. The distinction between those claims under a contract which result from a performance of it on the part of the claimant, and those claims under it which result from being prevented by the other party from performing it, has not always been attended to. The party who voluntarily and wrongfully puts an end to a contract and prevents the other party from performing it, is estopped from denying that the injured party has not been damaged to the extent of his actual loss and outlay fairly incurred.

The particular form of the petition in this case ought not to preclude the claimant from not recovering what was fairly shown by the evidence to be the damage sustained by him. Though it is true that he does pray judgment for damages arising from loss of profits, yet he also prays judgment for the amount of his outlay and expenses less the amount realized from the sale of materials on hand. The claim for profits, if not sustained by proof, ought not to preclude a recovery of the claim for losses sustained by outlay and expenses. In a proceeding like the present, in which the claimant sets forth, by way of petition, a plain statement of the facts without technical formality, and prays relief either in a general manner, or in an alternative or cumulative form, the Court ought not to hold the claimant to strict technical rules of pleading, but should

give to his statement a liberal interpretation, and afford him such relief as he may show himself substantially entitled to if within the fair scope of the claim as exhibited by the facts set forth in the petition.

We think that the judgment of the Court of Claims was right, and it is affirmed.

ABRAM WAKEMAN, JR., ET AL., APPELLANTS, *v.* THE WHEELER & WILSON MANUFACTURING COMPANY, RESPONDENT.

IN THE COURT OF APPEALS OF NEW YORK, JANUARY 19, 1896.

[*Reported in* 101 *New York Reports* 205.]

APPEAL from judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, entered upon an order made March 15th, 1883, which affirmed a judgment in favor of plaintiffs, entered upon a verdict, and affirmed an order denying a motion for a new trial.

This action was brought to recover damages for an alleged breach of contract, the substance of which as well as the material facts are set forth in the opinion.

Abram Wakeman for appellants.

William H. Williams for respondent.

EARL, J. This action was brought to recover damages for the breach of an agreement made in the city of New York in February, 1878, which is set forth in the complaint as follows: "That if the plaintiffs shall succeed in placing—that is to say, selling fifty of the defendant's sewing-machines to one firm or party in the Republic of Mexico during the next trip of their agent to that country then about to be made, they, the plaintiffs, for every fifty machines so sold shall have the sole agency for the sale of the defendant's sewing-machines in that locality and its vincity in that republic, and the defendant should furnish to the plaintiffs machines at the lowest net gold prices." The defendant denied the agreement, but the jury found it substantially as alleged; and it is conceded that we must assume here that such an agreement was made. The plaintiffs at once entered upon the performance of the agreement, purchased a sample machine of the defendant, caused their agent to be instructed in its mechanism and management, and then sent him to Mexico. After reaching there he sold fifty machines to one Mead of San Louis Potosi, on his promise to Mead that he

should be the general agent of the defendant for that locality and its vicinity. The order for the fifty machines was sent to the defendant and filled by it, and those machines were forwarded to Mexico and paid for. Shortly thereafter plaintiffs' agent made another sale of fifty machines for another locality in Mexico, and an order for those machines was sent to the defendant, which it absolutely refused to fill. Plaintiffs' agent procured another order for one machine and sent that to the defendant, which it also refused to fill ; and then it refused to fill any further orders from the plaintiffs or their agents, and absolutely refused to perform and repudiated its agreement. Upon the trial of the action the plaintiffs made various offers of evidence to show the value of their contract with the defendant, the most of which were excluded. In his charge to the jury the judge held as matter of law that the plaintiffs could recover damages only for the refusal of the defendant to fill the orders actually given ; and the plaintiffs' profits having been shown to be $4 on a machine, their recovery was thus limited to $204. They excepted to the rule of damages thus laid down, and the sole question for our determination is what, upon the facts of this case, was the proper rule of damages ? Were the plaintiffs confined to the damages suffered by them in consequence of the refusal of the defendant to fill the two orders for fifty-one machines, or were they entitled also to recover the damages which they sustained by a total breach of the agreement on the part of the defendant ? The judge limited the damages, as stated in his charge, because any further allowance of damages for the breach of the agreement would, as he claimed, be merely speculative and imaginary.

It is frequently difficult to apply the rules of damages and to determine how far and when opinion evidence may be received to prove the amount of damages ; and the difficulty is encountered in a marked degree in this case. One who violates his contract with another is liable for all the direct and proximate damages which result from the violation. The damages must be not merely speculative, possible, and imaginary, but they must be reasonably certain, and such only as actually follow or may follow from the breach of the contract. They may be so remote as not to be directly traceable to the breach, or they may be the result of other intervening causes, and then they cannot be allowed. They are nearly always involved in some uncertainty and contingency ; usually they are to be worked out in the future, and they can be determined only approximately upon reasonable conjectures and probable estimates. They may be so uncertain, contingent, and imaginary as to be

incapable of adequate proof, and then they cannot be recovered because they cannot be proved. But when it is certain that damages have been caused by a breach of contract, and the only uncertainty is as to their amount, there can rarely be good reason for refusing, on account of such uncertainty, any damages whatever for the breach. A person violating his contract should not be permitted entirely to escape liability because the amount of the damages which he has caused is uncertain. It is not true that loss of profits cannot be allowed as damages for a breach of contract. Losses sustained and gains prevented are proper elements of damage. Most contracts are entered into with the view to future profits, and such profits are in the contemplation of the parties, and so far as they can be properly proved, they may form the measure of damage. As they are prospective they must, to some extent, be uncertain and problematical, and yet on that account a person complaining of breach of contract is not to be deprived of all remedy. It is usually his right to prove the nature of his contract, the circumstances surrounding and following its breach, and the consequences naturally and plainly traceable to it, and then it is for the jury, under proper instructions as to the rules of damages, to determine the compensation to be awarded for the breach. When a contract is repudiated the compensation of the party complaining of its repudiation should be the value of the contract. He has been deprived of his contract, and he should have in lieu thereof its value, to be ascertained by the application of rules of law which have been laid down for the guidance of courts and jurors.

These rules will be illustrated and limited by a few cases, some of which are quite analogous to this, to which attention will now be called. In Masterton *v.* Mayor, etc., 7 Hill, 61, Nelson, C.J., said: "When the books speak of the profits anticipated from a good bargain as matter too remote and uncertain to be taken into the account in ascertaining the true measure of damages, they have reference to dependent and collateral engagements entered into on the faith and in expectation of the performance of the principal contract. . . . But profits or advantages which are the direct and immediate fruits of the contract entered into between the parties stand upon a different footing. . . . It is difficult to comprehend why, in case one party has deprived the other of the gains or profits of the contract by refusing to perform it, this loss should not constitute a proper item in estimating the damages." In Bagley *v.* Smith, 10 N. Y. 489, it was held that one partner could maintain an action at law

against the other for a breach of the partnership articles in dissolving before the period therein limited ; that the damages in such an action are the profits which would have accrued to the plaintiff from the continuation of the partnership business, and which are lost by the unauthorized dissolution, and that evidence of the actual gains of the partnership during its continuance is admissible as an element in determining the value of the prospective profits. Johnson, J., writing the opinion said : "The object of commercial partnerships is profit. This is the motive upon which men enter into the relation. The only legitimate beneficial consequence of continuing a partnership is the making of profits. The most direct and legitimate injurious consequence which can follow upon an unauthorized dissolution of a partnership is the loss of profits. Unless that loss can be made up to the injured party it is idle to say that any obligation is imposed by a contract to continue a partnership for a fixed period. The loss of profits is one of the common grounds, and the amount of profits lost one of the common measures of the damages to be given upon a breach of contract," and that "it is very true that there is great difficulty in making an accurate estimate of future profits. This difficulty is inherent in the nature of the inquiry. We shall not lessen it by shutting our eyes to the light which the previous transactions of the partnership throw upon it. Nor are we the more inclined to refuse to make the inquiry by reason of its difficulty, when we remember that it is the misconduct of the defendant which has rendered it necessary." In Taylor *v.* Bradley, 39 N. Y. 129, the action was to recover damages for the total breach by the defendant of a contract to let a farm to the plaintiff for three years, each party to furnish part of the stock, seeds, tools, etc., the plaintiff to occupy and work the farm and have certain specified supplies for his family, and all proceeds to be divided equally, and it was held that the plaintiff was entitled to recover as damages the value of the contract—that is, what such a privilege of occupancy and working the farm, subject to the conditions of the agreement and under all the contingencies which were liable to affect the result, was worth. Woodruff, J., writing the opinion, said : "To my mind the only rule which will do justice to the parties is that the plaintiff is entitled to the value of his contract ; he was entitled to its performance ; it is broken ; he is deprived of his adventure ; what was this opportunity which the contract had apparently secured to him worth ? To reap the benefit of it he must incur expense, submit to labor and appropriation of his stock. His damages are what he lost by being deprived of his chance of profit." An opinion in the

same case by Grover, J., is reported in 4 Abb. Ct. of App. Dec. 363, in which he said : " An examination of the cases will show that the courts have been endeavoring to establish rules by the application of which a party will be compensated for the loss sustained by the breach of the contract ; in other words, for the benefits and gains he would have realized from its performance, and nothing more. It is sometimes said that the profits that would have been derived from performance cannot be recovered ; but this is only true of such as are contingent upon some other operation. Profits which would certainly have been realized but for the defendant's default are recoverable. . . . It is not an uncertainty as to the value of the benefit or gain to be derived from performance, but an uncertainty or contingency whether such gain or benefit would be derived at all. . . . It is sometimes said that speculative damages cannot be recovered because the amount is uncertain ; but such remarks will generally be found applicable to such damages as it is uncertain whether sustained at all from the breach. Sometimes the claim is rejected as being too remote. This is another mode of saying that it is uncertain whether such damages resulted necessarily and immediately from the breach complained of. The general rule is that all damages resulting necessarily and immediately and directly from the breach are recoverable, and not those that are contingent and uncertain. The latter description embraces, as I think, such only as are not the certain result of the breach, and does not embrace such as are the certain result, but uncertain in amount ;" that " the plaintiff will be fully compensated by recovering the value of his bargain. He ought not to have more, and I think he is not precluded from recovering this by any infirmity in the law in ascertaining its amount." In Schell *v.* Plumb, 55 N. Y. 592, it was held that an agreement by one party to support another during life is an entire continuing contract, and that upon a total breach thereof the latter may recover full and final damages, not only the expenses of support up to the time of trial, but all the prospective expenses during life, and that the Northampton Tables are competent evidence as to the probable duration of life. Grover, J., writing the opinion, said : " The counsel for the appellants insists that such cannot be the rule, for the reason, as he insists, that it is impossible to ascertain the damages, as the duration of life is uncertain, and a further uncertainty arising from the future physical condition of the person. . . . It may be further remarked that in actions for personal injuries the constant practice is to allow a recovery for such prospective damages as the jury are satisfied the party will sustain notwith-

standing the uncertainty of the duration of his life and other contingencies which may probably affect the amount." In Dennis *v.* Maxfield, 10 Allen, 138, it was held that if a written contract by which the master of a whaling ship is employed provides that he shall have a certain "lay" in the proceeds and also an additional compensation depending upon the amount of the cargo, and he is wrongfully discharged by the owners before the expiration of the contract, he may recover as a part of his damages his share of the earnings of the ship both before and after his removal. Bigelow, C.J., writing the opinion and speaking of the earnings of the ship, said: "They are undoubtedly in their nature contingent and speculative and difficult of estimate, but being made by express agreement of the parties of the essence of the contract, we do not see how they can be excluded in ascertaining the compensation to which the plaintiff is entitled. Would it be a good bar to a claim for damages for breach of articles of copartnership that the profits of the contemplated business were uncertain, contingent and difficult of proof, and could it be held for this reason that no recovery could be had in case of a breach of such a contract? Or in an action on a policy of insurance on profits, would it be a valid defence in the event of loss to say that no damages could be claimed or proved because the subject of insurance was merely speculative, and the data on which the profits must be calculated were necessarily inadequate and insufficient to constitute a safe basis on which to rest a claim for indemnity?"

In Simpson *v.* London & N. W. R. Co., L. R., 1 Q. B. D. 274, the plaintiff, a manufacturer, who was in the habit of attending agricultural shows to exhibit samples of his goods, and made profit by the practice, delivered them upon a show-ground where he had been exhibiting them, to the receiving agent of the defendant, a railroad company, to be carried by a particular day to a show-ground at another place where a similar show at which he intended to exhibit was to be held; but nothing was expressly said about the intention of the plaintiff. The samples did not arrive until after the day stipulated and when the show was over; and the plaintiff lost several days in going to meet them and waiting for them. In an action for the breach of contract a verdict was given for damages which included a sum for loss of time or loss of profit; and it was held that the purpose of the plaintiff to exhibit was within the contemplation of the parties to the contract; that the plaintiff was entitled to the damages, on the ground that loss of profit was a natural and probable result of the failure of that purpose; and that no evidence was necessary of his prospect of making profit

at the particular show in question. Cockburn, C.J., said : "As to the supposed impossibility of ascertaining the damages, I think there is no such impossibility ; to some extent, no doubt, they must be matter of speculation, but that is no reason for not awarding any damages at all." Mellor, J., said : "As to the difficulty of ascertaining the amount of profits which the plaintiff can be supposed to have lost, that is not a matter upon which we have to trouble ourselves." Field, J., said : "As to the difficulty of ascertaining the profits which the plaintiff can be considered to have lost, a sufficient answer is that it must be assumed that the plaintiff would make some profits." In Jaques *v.* Millar, L. R., 6 Ch. Div. 153, the plaintiff agreed with the defendant to take a lease of premises belonging to defendant for the purpose, as the defendant knew, of carrying on a trade which the plaintiff was about to commence. In consequence of the defendant's wilful refusal to fulfil his agreement, the plaintiff was unable for fifteen weeks to commence his trade ; and it was held that, in addition to judgment for specific performance of the agreement, damages must be awarded in respect to plaintiff's loss of profits from his work during the fifteen weeks. To the same effect are the following cases : White *v.* Miller, 71 N. Y. 118 ; Mitchell *v.* Read, 84 N. Y. 556 ; Danolds *v.* State, 89 N. Y. 36 ; Hoy *v.* Gronoble, 34 Penn. 9 ; Garsed *v.* Turner, 71 N. Y. 56 ; McNeil *v.* Reid, 9 Bing. 68 ; Fletcher *v.* Tayleur, 17 C. B. 21.

In conflict, we think, with these authorities is the case of Howe Machine Co. *v.* Bryson, 44 Iowa, 159. In that case a party made a contract with the general agents of a sewing-machine company, by the terms of which he was to rent a room, provide himself with a team, and furnish other necessary means for the sale of machines, and devote his time thereto, the agents agreeing to furnish him with all the machines he could sell at a price 25 per cent below the retail rate. The party performed his undertaking, but the machines were not supplied as agreed ; and it was held that the measure of damages was the value of the time lost as the result of the breach, without reference to the profits which might have been realized if the contract had been performed. Two of the five judges dissented, and we concur with them.

Under the Civil Damage Act (ch. 646 of the Laws of 1873), and under the acts allowing the next of kin of one whose death has been caused by the wrong or carelessness of another to recover damages for such death, the amount of damages are exceedingly uncertain, problematical and contingent, and yet they must be left to the determination of a jury upon such facts as

can be proved. Etherington *v.* R. R. Co., 88 N. Y. 641; Houghkirk *v.* D. & H. C. Co., 92 N. Y. 219.

It is quite clear that the rules of damages having the sanction of these authorities were violated upon the trial of this action. The plaintiffs had the right under their agreement to establish agencies for the sale of defendant's machines anywhere in Mexico where they could sell fifty machines. An agency, when thus established, was to be exclusive, and was to have some permanency. It could not be broken up at the will of the defendant without some default on the part of the plaintiffs. That the agreement had some value to the plaintiffs is very clear, and of that value, whatever it was, they were deprived by the act of the defendant. It is quite true that that value, or, in other words, the damage caused to the plaintiffs by the total breach of the agreement by the defendant, is quite uncertain and difficult to be estimated. But the difficulty is not greater than it was in several of the cases above cited. There are some facts upon which a jury could base a judgment, not certain nor strictly accurate, but sufficiently so for the administration of justice in such a case. The agent whom plaintiffs sent to Mexico was apparently intelligent, capable, and well acquainted with Mexico. Machines could be delivered there, for about $30 per machine, and could then be sold at retail for about $125. The profit of the plaintiffs on each machine was about $4. Plaintiffs' agents readily made sales of one hundred and one machines, and were about to make other sales. One of defendant's agents subsequently sold in a single city twenty machines in six months, at $125 each. The plaintiffs had established two agencies, and to the value of such agencies at least they were entitled. Mead, who had one of the agencies, testified, that he had made arrangements with several parties to sell the machines; that he had all the facilities for carrying on an extensive and profitable business, and was well acquainted with the country. The population of several of the Mexican cities in which plaintiffs' agent was engaged in establishing agencies was shown. From all these and other facts proved it cannot be doubted that the plaintiffs suffered damages to at least several hundred dollars, and they should not have been deprived of the damages which they made to appear because they could not make clear the full amount of their damages. All the facts should have been submitted to the jury with proper instructions, and their verdict, not based upon mere speculation and possibilities, but upon the facts and circumstances proved, would have approached as near the proper measure of justice as the nature of the case and the infirmity which attaches to

the administration of the law will admit. In 1 Sutherland on Damages, 113, it is said : "If there is no more certain method of arriving at the amount, the injured party is entitled to submit to the jury the particular facts which have transpired, and to show the whole situation which is the foundation of the claim and expectation of profits so far as any detail offered has a legal tendency to support such claim."

We have not considered the bearing of the Statute of Frauds upon this case, as no point or reference to it was made upon the trial.

Our conclusion, therefore, is that this judgment should be reversed and a new trial granted, costs to abide event.

All concur.

Judgment reversed.[1]

PAGE *v.* NEWMAN.

In the King's Bench, May 8, 1829.

[*Reported in* 9 *Barnewall and Cresswell* 378.]

This was an action brought to recover the sum of £135 due upon the following instrument: "Guerêt, April 18th, 1814. In one month after my arrival in England, I promise to pay Captain W. E. Page, or order, the sum of £135 as sterling, for value received. C. Newman." The instrument was described in the first count of the declaration as an agreement ; in the second count as a promissory note. Pleas : first, general issue ; and, secondly, the statute of limitations. Replication to the last plea, that the plaintiff, in 1819, had commenced this suit by *latitat*, and continued it by a bill of Middlesex, to which there was a demurrer and judgment for the plaintiff.[2] At the trial before Lord Tenterden, C.J., at the Middlesex sittings after last Term, the following appeared to be the facts of the case. The plaintiff and defendant, in 1814, were prisoners of war at Verdun, in France. The plaintiff lent the defendant various sums of money ; and the latter, as a security for the payment of the same, signed the instrument declared on. In June, 1814, the defendant came to England. During the year 1818 the plaintiff applied to the defendant's attorney, in order to procure payment of the sum due on the note, and in 1819 commenced this action against the defendant. It was contended, on the

[1] A portion of the opinion relating to questions of evidence has been omitted.—Ed.

[2] See 8 B. & C. 489.

part of the plaintiff, that he was entitled to recover interest upon the principal sum secured by the written instrument, either from the expiration of six months after the defendant arrived in England, or at least from the time when he had endeavored to obtain payment of the sum due to him. Lord Tenterden, C.J., was of opinion, there being no express agreement to pay interest, that the plaintiff was not entitled to recover it by law, and a verdict was found for the plaintiff for £135 only.

Denman now moved for a new trial.

Lord TENTERDEN, C.J. It is a rule sanctioned by the practice of more than half a century, that money lent does not carry interest. In Calton *v.* Bragg,[1] Lord Ellenborough, speaking at that time of a period of more than fifty years, said, "During this long course of time no case has occurred where, upon a mere simple contract of lending, without an agreement for payment of the principal at a certain time, or for interest to run immediately, or under special circumstances, from whence a contract for interest was to be inferred, has interest ever been given." In Higgins *v.* Sargent,[2] which was an action of covenant upon a policy of insurance upon the life of one R. C. Burton, payable six months after due proof of his death, it was held that the assured were not entitled to recover interest upon the sum insured from the expiration of six months after the death of Burton. There (as in this case) the sum became due upon a contingency, and it was held that interest was not due from the time when the principal sum became payable. If we were to adopt as a general rule that which some of the expressions attributed to the Lord Chief Justice of the Common Pleas in Arnott *v.* Redfern would seem to warrant, viz., that interest is due wherever the debt has been wrongfully withheld after the plaintiff has endeavored to obtain payment of it, it might frequently be made a question at *nisi prius* whether proper means had been used to obtain payment of the debt, and such as the party ought to have used. That would be productive of great inconvenience. I think that we ought not to depart from the long-established rule, that interest is not due on money secured by a written instrument, unless it appears on the face of the instrument that interest was intended to be paid, or unless it be implied from the usage of trade, as in the case of mercantile instruments. Here the language of the instrument is such as to lead to the conclusion that the parties did not intend that interest should be payable. The sum secured by the instrument was £135 only, payable at a time depending on

[1] 15 East, 223. [2] 2 B. & C. 348.

a contingency, and no provision was made for the payment of interest up to that time. If there had been such a provision, it would have afforded a strong ground for contending that it was intended interest should also be paid from the time when the principal became due to the time of actual payment; but the omission of any such term in the instrument leads to the conclusion, that the sum of £135 was the only sum intended to be secured. In proceedings in error in the Exchequer Chamber, interest is allowed in those cases only where interest would have been recoverable in the court below.

Rule refused.

McMAHON *v.* THE NEW YORK AND ERIE RAILROAD COMPANY.

IN THE COURT OF APPEALS OF NEW YORK, DECEMBER, 1859.

[*Reported in* 20 *New York Reports* 463.]

APPEAL from the Supreme Court. Action to recover for work performed and materials furnished by Patrick McMahon (who had assigned his claim to the plaintiff) in the construction of two sections of the New York and Erie Railroad. The trial was before one of the justices, without jury and sitting in part out of Term time, under a stipulation, substantially as referee. It appeared that the work was performed under a written contract, and was completed in October, 1848. A large part of it consisted of earth and rock excavation, of which three different classes were defined in the contract, a different price being stipulated for the execution of each class. The contractor had received monthly payments, according to the estimates, classifications and measurements made by the engineers of the defendant; and if these were correct, there was a very trifling sum due to him when the work was completed. The referee reported that there was due to the plaintiff the sum of $9927.85 for which judgment was rendered. Upon appeal, the Court at General Term, in the Third District, affirmed the judgment conditionally, upon the plaintiff stipulating to deduct $914.49, which he did, and the defendant appealed to this Court. The material facts are sufficiently stated in the following opinion.

D. B. Eaton for the appellant.

John K. Porter for the respondent.

SELDEN, J. The decision filed by the referee in this case consists of a series of mingled conclusions of fact and of law;

and the printed case contains no such statement of the facts found by him as will of itself enable this Court to judge as to the accuracy of those conclusions. I find, however, appended to the case, a printed paper, entitled in the cause and headed: "Statement of Facts." It is not signed, nor in any way specially authenticated; but from its position, I shall assume, especially as against the appellant, by whom the papers are presented, that it is authentic, and shall follow it so far as practicable, and refer to the other parts of the case for the purpose of explanation only.

An exception was taken to the allowance of interest by the referee, and this is now insisted upon as fatal to the judgment.[1]

The old common law rule, which required that a demand should be liquidated, or its amount in some way ascertained before interest could be allowed, has been modified by general consent, so far as to hold that if the amount is capable of being ascertained by mere computation, then it shall carry interest; and this Court in the case of Van Rensselaer *v.* Jewett (2 Comst., 135) went a step further, and allowed interest upon an unliquidated demand, the amount of which could be ascertained by computation, together with a reference to well-established market values; because such values in many cases are so nearly certain, that it would be possible for the debtor to obtain some proximate knowledge of how much he was to pay. That case went, I think, as far as it is reasonable and proper to go in that direction. So long as the courts adhere even to the principles of that case, they are not without a rule which it is possible to apply. The rule itself is definite, and the only uncertainty which it introduces is that which necessarily attends the settling of market rates and prices. In the present case the plaintiff's demand was neither liquidated nor capable of being ascertained by computation merely; nor could its amount be determined by any reference to ordinary market rates, and hence interest could not be recovered here upon the principle adopted in the case of Van Rensselaer *v.* Jewett.

There is, however, another ground upon which interest sometimes is allowed, and perhaps with propriety may be, although the amount of the demand neither has been nor can readily be ascertained, viz., that the debtor is in default for not having taken the requisite steps to ascertain the amount of his debt. The present case is one which strongly illustrates the reasonableness of such a rule. Whether the engineer, by whom the work was to be measured, is to be legally regarded in respect to that duty, as the agent of both parties, or of the defendants

[1] Only so much of the opinion is given as relates to this question.—Ed.

only, he was in the general employment of the defendants, and ready to obey their behests. If they had done their duty, by causing him to make an accurate estimate of the work, the amount of the claim would have been so ascertained as to have carried interest. Perhaps they ought not to be considered as in default until they were requested by the contractor to have an estimate made ; because it was as much his duty to request to have it done, as it was theirs to direct the engineer to do it. Interest, therefore, if allowed upon this principle, should be computed only from the time of the refusal by the defendants when called upon, either to cause a final estimate to be made, or to correct that already made. The inference from the "statement of facts" is, that this refusal must have been after the making of the estimate, introduced and relied upon by the defendants upon the trial, and that bears date in March, 1849 ; while the referee has computed interest from October 1st previous, making at least five months' interest, which in this view of the case was improperly allowed.

The judgment must therefore be affirmed.

All the judges concurring.

Judgment affirmed.

THE LONDON, CHATHAM AND DOVER RAILWAY COMPANY, APPELLANTS, *v.* THE SOUTHEASTERN RAILWAY COMPANY, RESPONDENTS.

IN THE HOUSE OF LORDS, JULY 28, 1893.

[*Reported in Law Reports* (1893) *Appeal Cases* 429.]

APPEAL from an order of the Court of Appeal (1892) 1 Ch. 120. Disputes having arisen upon a joint traffic agreement made in 1865 between the appellant and respondent companies they were referred to Mr. Smithells. The only question with which this report is concerned arose upon that part of his award made on September 22d, 1868, by which he determined as follows :

"That for the future rendering, examining, and settling of the joint traffic agreement accounts between the two companies, they shall be made up monthly, and completed within a reasonable period, and as early as possible. For example : First, the ordinary accounts for the month of February shall be rendered by each company to the other not later than the middle of the third month (May).

"Second, the joint agreement account, compiled from the ordinary account, shall be exchanged between the companies by the end of the same month (May).

"Third, a payment of not less than 75 per cent shall be made on account of the balance appearing to be due on the face of the accounts so exchanged, and this payment shall be made as soon after June 1st as possible, and not later than June 15th. . . ."

Disputes having arisen as to the accounts under the award the appellants brought an action in 1884 against the respondents, claiming an account. The official referee who took the account found a large sum due from the defendants to the plaintiffs, of which about £36,000 was for interest which he allowed under 3 & 4 Wm. 4, ch. 42. Kekewich, J., allowed the interest: the Court of Appeal (Lindley, Bowen, and Kay, L.JJ.) disallowed it.[1] The plaintiffs appealed upon this point and upon another question not relevant to this report.

By 3 & 4 Wm. 4, ch. 42, § 28, it is enacted "That upon all debts or sums certain, payable at a certain time or otherwise, the jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums certain be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment; provided that interest shall be payable in all cases in which it is now payable by law."

Sir Horace Davey, Q.C., and *Haldane*, Q.C. (*Levett*, Q.C., and *Warrington* with them) for the appellants.

William Willis, Q.C., and *C. T. Mitchell* for the respondents.

Lord Herschell, L.C. My lords, the official referee allowed interest on the sums he found to be due by virtue of what is known as Lord Tenterden's act. Kekewich, J., was of opinion that he was justified in so doing. The Court of Appeal took a different view. The provisions of that act (3 & 4 Wm. 4, ch. 42, § 28) are as follows: "That upon all debts, or sums certain, payable at a certain time"—I leave out for the moment the words "or otherwise" because they relate to a different part of the section to which I shall have to refer presently—"the jury on the trial of any issue or on any inquisition of damages, may if they shall think fit allow interest to the creditor at a rate not

[1] (1892) 1 Ch. 120.

exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time."

In order, therefore, to justify the allowance of interest, it must be shown that there is a debt or sum certain payable at a certain time by virtue of some written instrument. Unless that can be established the case does not come within the words of that part of the section.

In the present case it is contended on behalf of the respondents that there was no debt or sum payable at a certain time under a written instrument. The case on behalf of the appellants rests upon the provisions of Mr. Smithells's award, by which a payment of not less than 75 per cent was to be made "on account of the balance appearing to be due on the face of the accounts so to be exchanged, and this payment shall be made as soon after June 1st as possible, and not later than June 15th." It is said that 75 per cent of the balance, than which the payment was not to be less, was an ascertainable amount by looking at the account, and that therefore it was a "sum certain;" that "as soon after June 1st as possible, and not later than June 15th," indicated at latest June 15th, and that was a "time certain," and therefore you had a sum certain payable at a time certain, namely, June 15th, and by virtue of a written instrument, namely, Mr. Smithells's award.

The question which arises has not been without judicial consideration in previous cases. In Merchant Shipping Company *v.* Armitage,[1] the Exchequer Chamber came to the conclusion that where a sum of money was payable under a charterparty after the right delivery of the cargo, in cash two months after the date of the ship's report inwards at the custom house, although the time was ascertained and became settled by the event, the money was not payable at a "time certain" within the meaning of the statute. In the case of Duncombe *v.* Brighton Club and Norfolk Hotel Company,[2] which was decided more than a year after, but in ignorance of the fact that the Exchequer Chamber had decided in the manner that I have mentioned, Mellor and Lush, JJ., came to the conclusion that although you had not the sum or the time actually mentioned in the written instrument, yet if the written instrument contained provisions which on the happening of an event rendered the time or the sum certain, that was sufficient within the meaning of the statute, and interest could be allowed. Blackburn, J., differed from the decision at which the majority had arrived. He took the same view of the statute as the Exchequer

[1] Law Rep. 9 Q. B. at p. 114. [2] Law Rep. 10 Q. B. 371.

Chamber had done in the case of Armitage in the previous year. I do not think it is necessary to express any decided opinion as to which of those views is the correct one. Undoubtedly the decision of the Exchequer Chamber, supported as it is by the concurrence of Blackburn, J., arrived at independently and in ignorance of the decision of the Exchequer Chamber, is authority of very great weight; and I should not dissent from such a body of authority without very serious consideration. But, my lords, in the present case I do not think it necessary to decide between those two differing views, because even if the view of the law taken in Duncombe's case[1] by the majority be more accurate than the view expressed by Blackburn, J., in that case, and by the Exchequer Chamber in Armitage's case,[2] I do not think that here it can be said that there was a sum certain payable at a time certain by virtue of a written instrument. There are several difficulties in the way of so holding. For example, the time of payment is to be "as soon after June 1st as possible, and not later than June 15th." It is a little difficult to say that that is a time certain even as regards June 15th; but upon that I do not dwell. The real difficulty is this—although the words of the statute are "debts or sums certain payable," I think that the certain sum payable must be a certain sum which is due absolutely and in all events from the one party to the other, though it may not come, strictly speaking, within the term "debt." But here the payment of this 75 per cent was really provisional only. No doubt it was contemplated as very unlikely that there would be any rectification or verification of the accounts which would make a difference of more than 25 per cent. Nevertheless, if it had appeared that in reality, owing to errors in the accounts, 75 per cent exceeded the amount due, that would have had to be adjusted by some kind of repayment or rectification in a subsequent account; and, therefore, this is not really a provision for the payment of a debt or a sum certain absolutely from one party to the other; it is at best a provisional payment which may have to be undone by a subsequent adjustment. My lords, for these reasons I do not think it can be held in the present case that there is a sum certain payable at a certain time by virtue of a written instrument.

Then the statute provides for another case in which interest may be allowed, namely, if a demand has been made in writing for the amount with notice that interest will be claimed. In the present case that has not been complied with. It has been said that there was not an opportunity of complying with it

[1] Law Rep. 10 Q. B. 371. [2] Law Rep. 9 Q. B. at p. 114.

because for a time the respondents refused to exchange accounts and to proceed under the agreement at all. In certain cases that might in equity entitle the party who was in the right in the contest to treat the matter as if he had given such notice ; if, for example, he had written, " It is impossible to ascertain the exact amount because you will not give me a proper account ; but I give you notice that I claim whatever is the amount, with interest from this date." I think if he had taken such a step as that, although it would not have been at law a compliance with the terms of the statute, in equity he would have been regarded and ought to have been regarded as being in the same position as if he had complied with the statute. But in the present case there was no attempt, as far as I can see, to do anything of the kind. There was nothing like a notice given that a certain sum was due and that interest would be claimed, and that the only reason why the amount was not stated was that there had been a failure to deliver the necessary accounts. Therefore at law the case is clearly not within the second part of § 28 of Lord Tenterden's act, nor do I think that in equity a sufficient case has been established to entitle the appellants to interest.

But, my lords, the appellants contended that even although they might not under the terms of Lord Tenterden's act be entitled to interest, yet interest might be given by way of damages in respect of the wrongful detention of their debt. I confess that I have considered this part of the case with every inclination to come to a conclusion in favor of the appellants, to the extent at all events, if it were possible, of giving them interest from the date of the action ; and for this reason, that I think that when money is owing from one party to another and that other is driven to have recourse to legal proceedings in order to recover the amount due to him, the party who is wrongfully withholding the money from the other ought not in justice to benefit by having that money in his possession and enjoying the use of it, when the money ought to be in the possession of the other party who is entitled to its use. Therefore, if I could see my way to do so, I should certainly be disposed to give the appellants, or anybody in a similar position, interest upon the amount withheld from the time of action brought at all events. But I have come to the conclusion, upon a consideration of the authorities, agreeing with the court below, that it is not possible to do so, although no doubt in early times the view was expressed that interest might be given under such circumstances by way of damages.

The first case to which we were referred was Eddowes v.

Hopkins,[1] where Lord Mansfield held, "that though by the common law book debts do not of course carry interest, it may be payable in consequence of the usage of particular branches of trade or of a special agreement," which of course is beyond question, "or in cases of long delay under vexatious and oppressive circumstances if a jury in their discretion shall think fit to allow it." That is somewhat vague; the jury would have to consider whether there had been a long delay and whether the circumstances were vexatious and oppressive, and some difficulty might be felt in determining either what was sufficiently long to satisfy the rule or what was vexatious and oppressive.

In a subsequent case, De Havilland *v.* Bowerbank,[2] Lord Ellenborough laid down a somewhat different rule; he said that interest ought only to be allowed (1) where there is a contract for payment on a day certain, as on bills of exchange; (2) where there is an express promise; (3) where it may be inferred from the course of dealing; and (4) where the money has been actually used and interest made of it. This is much more limited than the doctrine laid down by Lord Mansfield, and there seems a good deal in the point made by the then attorney-general with reference to the last ground, that the damages would be estimated by what the defendant had gained, not by what the plaintiff had lost. I cannot say that the rules laid down by Lord Ellenborough are very satisfactory.

In the case of Arnott *v.* Redfern[3] the question came before the Court of Common Pleas, presided over by Best, C.J., the other judges being Park, Burrough, and Gaselee, JJ. That was a case in which a judgment had been obtained in a Scotch Court, and interest had been given, practically speaking, I think from the time when the debt had become due. The question was whether in a declaration on this judgment in this country the part of the claim relating to interest should be allowed. Best, C.J., in giving the judgment of the Court, considered whether interest could have been given under such circumstances according to the law of England. He quoted the case of Eddowes *v.* Hopkins,[4] and he also quoted the passage cited by the learned counsel yesterday in argument, where the Lord Chancellor said, in the case of Craven *v.* Tickell:[5] "From conversations which I have had with the judges, interest is given either by the contract or in damages upon every debt detained." And in his judgment Best, C.J., says: "If it had appeared by evidence that the plaintiff had taken no steps

[1] 1 Douglas, 376. [2] 1 Camp. 50. [3] 3 Bing. 353.
[4] 1 Douglas, 376. [5] 1 Ves. Jun. 60.

for so many years to recover his debt, interest could not have been recovered for it in this country ; and the question would have arisen whether we could have carried into execution the judgment of the Scotch Court which gave interest in a case where our law did not allow it." "But we have no right to conclude that the plaintiff quietly permitted the debt due to him to remain in the hands of the defendant. In many cases it is presumed that when nothing is proved to have been done nothing has been done ;" but that he says was not the case before him. Then he says : "However a debt is contracted, if it has been wrongfully withheld by the defendant after the plaintiff has endeavored to obtain payment of it, the jury may give interest in the shape of damages for the unjust detention of the money." Now, that is a very clear expression of principle and a rule sufficiently definite. The only difficulty which might arise is in construing what is meant by "endeavoring to obtain payment of it." If it were confined to endeavoring to obtain payment by process of law, there would not be the slightest difficulty, and the rule might well have been worked out. But I think from the expressions used that probably the Chief Justice did mean to refer, not merely to endeavoring to obtain it by litigation, but endeavoring to obtain it by demand or otherwise. If that general proposition had been regarded as law, I think that it might have justified in the present case allowing interest to some extent to the appellants.

But in the case of Page *v.* Newman[1] the matter was considered by the Court of King's Bench, presided over by Lord Tenterden, the other judges sitting with him being certainly judges of high authority, namely, Bayley, Littledale, and Parke, JJ. He there referred to the language of Best, C.J., which I have just read, and he said : "If we were to adopt as a general rule that which some of the expressions attributed to the Lord Chief Justice of the Common Pleas in Arnott *v.* Redfern[2] would seem to warrant, viz., that interest is due wherever the debt has been wrongfully withheld after the plaintiff has endeavored to obtain payment of it, it might frequently be made a question at *nisi prius* whether proper means had been used to obtain payment of the debt and such as the party ought to have used. That would be productive of great inconvenience. I think that we ought not to depart from the long-established rule that interest is not due on money secured by a written instrument unless it appears on the face of the instrument that interest was intended to be paid, or unless it be implied from the usage of trade, as in the case of mercantile instruments."

[1] 9 B. & C. 378. [2] 3 Bing. 353.

Now, my lords, I cannot profess to be altogether satisfied with the reason which Lord Tenterden gives, although, of course, for so eminent a judge one entertains the greatest respect. To say that it might be made a question at *nisi prius* whether proper means had been used, and that it might be productive of great inconvenience, does not seem to me a satisfactory reason for excluding altogether any claim to interest by way of damages in cases where justice requires that it should be awarded. There might be inconvenience; but it seems to me that such inconvenience might reasonably be submitted to, and ought to be submitted to, if it is necessary for the purpose of applying a sound principle in a just manner. There are a great many things at *nisi prius* which are decidedly inconvenient; no doubt one would desire always to avoid inconvenience in determining questions between litigants; but it cannot be avoided, and therefore I do not profess to be altogether satisfied with the reason which Lord Tenterden gives. Nevertheless, so far as I am aware, from that time down to the present the rule which Lord Tenterden lays down has been followed, and no attempt has been made (or at all events has received the sanction of the Courts) to revert to the earlier and, as I think, more liberal views of those who preceded him. And one cannot shut one's eyes to the fact that Lord Tenterden, who presided and delivered that judgment, was the author of the statute to which I have been directing the attention of your lordships under which interest can now be allowed; and when he dealt with the allowance of interest in this statute he certainly introduced language which kept such claims within very narrow limits; speaking for myself, they seem to be too narrow for the purposes of justice. Nevertheless, having regard to the view of the law laid down by the Court of King's Bench in the case which I have just mentioned, and to the statute passed subsequently with obvious reference to it by the legislature, and the absence since that time of any case in which the doctrine of Lord Mansfield or of Best, C.J., has received practical effect in any decision in any of the courts, I do not think it would be possible nowadays to reopen the question, even in this House, and to hold that interest under such circumstances could be awarded.

My lords, for these reasons I have come to the conclusion that the court below were right upon the question of interest, and that their judgment in that respect must be affirmed. Inasmuch as I move your lordships to reverse that judgment so far as it relates to the £30,000 item and to affirm it so far as it relates to interest, I would advise your lordships that no costs

should be given either in this House or in the Court of Appeal, but that here and in the Court of Appeal each party should bear their own costs.

Order appealed from reversed on a point not relevant to this report ; in other respects affirmed ; the appellants and respondents respectively to bear their own costs in this House and in the Court of Appeal ; Cause remitted to the Chancery Division.[1]

KEMBLE *v.* FARREN.

IN THE COMMON PLEAS, JULY 6, 1829.

[*Reported in* 6 *Bingham* 141.]

ASSUMPSIT by the manager of Covent Garden Theatre against an actor, to recover liquidated damages for the violation of an engagement to perform at Covent Garden for four seasons.

By an agreement between the plaintiff and defendant, the defendant had engaged himself to act as a principal comedian at Covent Garden Theatre for four seasons, commencing with October, 1828, and in all things to conform to the regulations of the theatre. The plaintiff agreed to pay the defendant £3 6*s.* 8*d.* every night on which the theatre should be open for theatrical performances during the ensuing four seasons ; and that the defendant should be allowed one benefit night during each season, on certain terms therein specified. And the agreement contained a clause, that if either of the parties should neglect or refuse to fulfil the said agreement, or any part thereof, or any stipulation therein contained, such party should pay to the other the sum of £1000, to which sum it was thereby agreed that the damages sustained by any such omission, neglect, or refusal should amount ; and which sum was thereby declared by the said parties to be liquidated and ascertained damages, and not a penalty or penal sum, or in the nature thereof.

The breach alleged was, that the defendant refused to act during the second season ; and at the trial the jury gave a verdict for the plaintiff for £750 damages, subject to a motion for increasing them to £1000, if the Court should be of opinion that, upon this agreement, the plaintiff was entitled to the whole sum claimed as liquidated damages.

Spankie showed cause.

Wilde, contra.

[1] The concurring opinions of Lords Watson and Shand have been omitted.—ED.

TINDAL, C.J. This is a rule which calls upon the defendant to show cause why the verdict, which has been entered for the plaintiff for £750, should not be increased to £1000.

The action was brought upon an agreement made between the plaintiff and the defendant, whereby the defendant agreed to act as a principal comedian at the Theatre Royal, Covent Garden, during the four then next seasons, commencing October, 1828, and also to conform in all things to the usual regulations of the said Theatre Royal, Covent Garden; and the plaintiff agreed to pay the defendant £3 6*s.* 8*d.* every night on which the theatre should be open for theatrical performances, during the next four seasons, and that the defendant should be allowed one benefit night during each season, on certain terms therein specified. And the agreement contained a clause, that if either of the parties should neglect or refuse to fulfil the said agreement, or any part thereof, or any stipulation therein contained, such party should pay to the other the sum of £1000, to which sum it was thereby agreed that the damages sustained by any such omission, neglect, or refusal, should amount; and which sum was thereby declared by the said parties to be liquidated and ascertained damages, and not a penalty or penal sum, or in the nature thereof.

The breach alleged in the declaration was, that the defendant refused to act during the second season, for which breach, the jury, upon the trial, assessed the damages at £750; which damages the plaintiff contends ought by the terms of the agreement to have been assessed at £1000.

It is, undoubtedly, difficult to suppose any words more precise or explicit than those used in the agreement; the same declaring not only affirmatively that the sum of £1000 should be taken as liquidated damages, but negatively also that it should not be considered as a penalty, or in the nature thereof. And if the clause had been limited to breaches which were of an uncertain nature and amount, we should have thought it would have had the effect of ascertaining the damages upon any such breach at £1000. For we see nothing illegal or unreasonable in the parties, by their mutual agreement, settling the amount of damages, uncertain in their nature, at any sum upon which they may agree. In many cases, such an agreement fixes that which is almost impossible to be accurately ascertained; and in all cases, it saves the expense and difficulty of bringing witnesses to that point. But in the present case, the clause is not so confined; it extends to the breach of any stipulation by either party. If, therefore, on the one hand, the plaintiff had neglected to make a single payment of

£3 6*s.* 8*d.* per day, or on the other hand, the defendant had refused to conform to any usual regulation of the theatre, however minute or unimportant, it must have been contended that the clause in question, in either case, would have given the stipulated damages of £1000. But that a very large sum should become immediately payable, in consequence of the nonpayment of a very small sum, and that the former should not be considered as a penalty, appears to be a contradiction in terms; the case being precisely that in which Courts of Equity have always relieved, and against which Courts of Law have, in modern times, endeavored to relieve, by directing juries to assess the real damages sustained by the breach of the agreement. It has been argued at the bar, that the liquidated damages apply to those breaches of the agreement only which are in their nature uncertain, leaving those which are certain to a distinct remedy, by the verdict of a jury. But we can only say, if such is the intention of the parties, they have not expressed it; but have made the clause relate, by express and positive terms, to all breaches of every kind. We cannot, therefore, distinguish this case, in principle, from that of Astley *v.* Weldon, in which it was stipulated, that either of the parties neglecting to perform the agreement should pay to the other of them the full sum of £200, to be recovered in his Majesty's Courts at Westminster. Here there was a distinct agreement, that the sum stipulated should be liquidated and ascertained damages; there were clauses in the agreement, some sounding in uncertain damages, others relating to certain pecuniary payments; the action was brought for the breach of a clause of an uncertain nature; and yet it was held by the Court, that for this very reason it would be absurd to construe the sum inserted in the agreement as liquidated damages, and it was held to be a penal sum only. As this case appears to us to be decided on a clear and intelligible principle, and to apply to that under consideration, we think it right to adhere to it, and this makes it unnecessary to consider the subsequent cases, which do not in any way break in upon it. The consequence is, we think the present verdict should stand, and the rule for increasing the damages be discharged.

Rule discharged.

WILLIAM REYNOLDS *v.* STEPHEN FRANKLIN BRIDGE.

IN THE QUEEN'S BENCH, MAY 26, 1856.

[*Reported in* 6 *Ellis & Blackburn* 528.]

THE declaration recited that heretofore, to wit, December 10th, 1852, by an indenture, then made between defendant of the one part and plaintiff of the other part, after reciting (among other things) that defendant and plaintiff had, since April 1st, 1847, carried on the business of surgeons and apothecaries in partnership in Wellington in Somersetshire, for the term and under the conditions in that indenture mentioned: It was witnessed that each of them, defendant and plaintiff, so far as the covenants and agreements therein contained and hereinafter mentioned were to be observed or performed by him, his heirs, executors, or administrators, did thereby, for himself, his heirs, executors, and administrators, covenant with the other of them in manner following; that is to say (among other covenants): that the said practice or business should be carried on at Wellington aforesaid, under the style or firm of Bridge & Reynolds, for the term of three years from August 6th, 1852, if both of them should so long live; but that the said practice and business should belong to, and be the exclusive property of, the plaintiff, subject nevertheless to the payments to defendant therein mentioned. That the dispensing part of the said business should be carried on at the dwelling-house of plaintiff, or at such other place or places in Wellington as he should at any time during the said three years determine; that both defendant and plaintiff would, during the said term of three years, diligently employ himself in such business, or carry on the same to the greatest advantage. That an account of all business done and all transactions relating thereto should be daily charged and entered by each of the said parties in proper books, to be kept for that purpose, in such manner as was usually done by persons of the same profession, and that a fair and clear account of the said practice or business and the true state thereof might appear; and, in particular, that a book should be kept by each of the said parties for the entries of all moneys and cash to be received by each of them on account of the said practice or business, wherein all such receipt of money and cash should be daily entered from time to time. That each of the said parties would, from time to time and at all times during the continu-

ance of the said term of three years, be just and true to each other in all their accounts, dealings, and transactions relating to the said practice and business, and would give and render to the other of them a just and faithful account of same when reasonaby required so to do. That, after the determination of the said term of three years, and so long as the plaintiff should reside in Wellington or within twelve miles thereof, defendant should not practise or carry on, either directly or indirectly, by himself or by any partner, apprentice, or assistant, the profession or business of a surgeon or apothecary, or see any patients (except as thereinafter and hereinafter mentioned), nor assist or introduce any other medical man in the town of Wellington or within twelve miles thereof, but should, before the expiration of the said term of three years, introduce the plaintiff to all such persons as might be the exclusive patients of the defendant; and should also, during the said term, use his best endeavors to secure the same for the plaintiff after the expiration of such three years. Provided always, that it was thereby expressly agreed and declared, that, in case defendant should make default in the observance or performance of the covenant lastly thereinbefore contained and herein mentioned, defendant should forthwith pay unto plaintiff the sum of £2000, "but not in the nature of a penalty, but as ascertained liquidated damages." That, notwithstanding the clause lastly thereinbefore contained and hereinbefore mentioned, the defendant might, after the determination of the said term of three years, act in consultation with other medical gentlemen in the town of Wellington and elsewhere. That defendant might also, if he thought fit, after the determination of the said term of three years, attend midwifery cases in the town of Wellington and within twenty miles thereof, the fees for which should be equal to or exceed the sum of £1 1*s*. That, in case either of them should make default in the due observance and performance of all and every the clauses, covenants, conditions, articles, and agreements therein contained, either of them, the defendant and plaintiff, should pay unto the other of them the sum of £500, as and for liquidated damages, and not in the nature of a penalty. As by the same indenture at large appears.

Averment: that, although plaintiff from the time of the making of that indenture hitherto has always been ready and willing to observe, etc., and hath observed, etc., all things therein contained on his part to be observed, etc., and although all things have been done and suffered, and have happened, to entitle plaintiff to commence and prosecute the action in respect of the several breaches and causes of action herein mentioned;

yet defendant hath broken his said covenants in manner following; that is to say, etc. The declaration then, after alleging three breaches of earlier covenants, averred, as a fourth breach: "That, after the determination of the said term of three years, and so long as plaintiff resided in Wellington, and within twelve miles thereof, defendant practised and carried on, directly and indirectly, by himself and by assistants, the profession and business of a surgeon and apothecary, and saw patients otherwise than as in the said indenture is excepted, and assisted and introduced other medical men in the town of Wellington and within twelve miles thereof; and, before the expiration of the said term of three years, would not introduce plaintiff to all or any such persons as might be and were the exclusive patients of defendant; and did not also, during the said term, use his best endeavors to secure the same to plaintiff after the expiration of such three years. And, although defendant has made default in the observance or performance of the covenants lastly hereinbefore mentioned, he hath not forthwith paid unto plaintiff the sum of £2000, or any part thereof. And the plaintiff avers that the several breaches herein assigned do not relate to the defendant, after the determination of the said term of three years, acting in consultation with other medical gentlemen in the town of Wellington aforesaid or elsewhere, nor to the said defendant, after the determination of the said term of three years, attending midwifery cases in the town of Wellington aforesaid and within twenty miles thereof, the fees for which were equal to or exceeded the sum of one guinea. And, although the defendant in manner aforesaid hath made default in the due observance and performance of the clauses, covenants, conditions, articles, and agreements as aforesaid, he hath not paid the plaintiff the sum of £500, or any part thereof."

The indenture was set out verbatim in the pleas. It contained many clauses not set forth in the declaration; but the only addition material to the question here decided was that the provision permitting the defendant to practise midwifery appeared to be as follows: "That the said Stephen Franklin Bridge may also, if he thinks fit, after the determination of the said term of three years, attend midwifery cases in the town of Wellington aforesaid, and within twenty miles thereof, the fees for which shall be equal to or exceed the sum of one pound one shilling; but he shall pay one half of the fees which he shall receive for each of such midwifery cases unto the said William Reynolds so long as the said William Reynolds shall be alive and shall continue to practise his said profession at

Wellington aforesaid ; but the fees for any midwifery cases that the said Stephen Franklin Bridge may attend at a greater distance than twenty miles from the town of Wellington aforesaid shall belong exclusively to him."

Plea 4, to the fourth breach : That defendant did not, after the determination of the said term of three years, and so long as the plaintiff resided in Wellington aforesaid, or within twelve miles thereof, practise or carry on, directly or indirectly, by himself or by assistants, the profession and business of a surgeon or apothecary, or see patients otherwise than in the said indenture is excepted, or assist to introduce other medical men as alleged ; and that he, the defendant, did, before the expiration of the said term of three years, introduce the plaintiff to all and every such person and persons as might be and were the exclusive patients of the defendant ; and the defendant did also, during the said term, use his best endeavors to secure the same to the said plaintiff after the expiration of such three years, according to his covenant in that behalf.

Issue was taken on this plea, and on several others not important to the question afterward discussed.

On the trial, before Channell, at the last Somersetshire Assizes, the jury found a verdict for the plaintiff on all the issues. The learned Serjeant expressed an opinion that the damages were liquidated by the terms of the indenture ; the jury, however, under the directions of the learned Serjeant, finding what they considered to be the damages actually sustained in respect of the several breaches, which they assessed at £1200. The verdict was entered for £2500 with leave to move to reduce it to £1200.

In last Term, Collier obtained a rule for a new trial, "on the ground of misdirection of the learned judge on the subject of the penalty," "and also on the ground of the damages being excessive on each of the breaches." The rule was obtained on several other grounds ; but, upon the argument in banc, at the suggestion of the Court and by the assent of counsel, it was arranged that the claim of the plaintiff should be limited to the £2000, on the fourth breach ; and that the only question to be discussed should be whether the £2000 named was in the nature of liquidated damages or of a penalty.

Kinglake, *Montague Smith*, and *Coleridge* now showed cause.

Collier, *E. W. Cox*, and *Karslake* were heard in support of the rule.

(Lord CAMPBELL, C.J., was absent.)

COLERIDGE, J. I am of opinion that this rule should be discharged, and that the sum named is liquidated damages by the

agreement of the parties. The question arises on the covenant, which I will read as written, not forgetting the argument urged from the exception. (His lordship then read the covenant, from "That after the determination" to "expiration of such three years.") Then follows the proviso: Provided always, and it was thereby expressly agreed and declared, that in case the defendant should make default in the observance or performance of the covenant lastly thereinbefore contained and herein mentioned, defendant would forthwith pay unto the plaintiff the sum of £2000, "not in the nature of a penalty, but as ascertained liquidated damages." Now, throwing for the moment the exception out of the question, this is a covenant for the performance or non-performance of several things; and the damages resulting from a breach in every instance must be uncertain, whether they arise from doing what the covenant forbids or not doing what the covenant requires. What then is the principle established by the cases? I think there is no great disagreement among the authorities, as to the instances in which the sum named is to be considered constituting liquidated damages or a penalty. All that the Courts have done has been only to lay down a canon for establishing the intention of the parties. In no case is it said that the question can be determined from the circumstance that the sum named may very often be an exaggerated estimate of the actual damage. In Astley *v.* Weldon, 2 B. & P. 351, Lord Eldon distinctly laid down that the mere magnitude of the sum named could not prevent it from being liquidated damages. Another rule has been suggested, that, where the sum is to be paid for the breach of an agreement comprehending more than one stipulation, it shall not be taken for liquidated damages. That is certainly found in some cases; but it cannot be said to be law now; in Kemble *v.* Farren it was clearly laid aside; Tindal, C.J., saying: "if the clause had been limited to breaches which were of an uncertain nature and amount, we should have thought it would have had the effect of ascertaining the damages upon any such breach at £1000." So in Atkyns *v.* Kinnier, 4 Exch. 776, we find the same doctrine. But the principle seems to be, that, if you find a covenant the breach of which will occasion a damage, not uncertain, but such as is capable of being ascertained, as where there is a particular sum to be paid which is much less than the sum named as payable upon the breach, there it is held that the last-named sum is specified by way of penalty, because a Court of equity would limit the amount to be actually paid. Then comes the case where there are several provisions, the breach of some of

which will produce an ascertainable damage, but the breach of others an uncertain damage. In that case (though we do not require to determine it now), inasmuch as there is one provision in respect of which the sum named cannot be taken as liquidated damages, it cannot be so taken for any provision; for, if it could, the contract would mean liquidated damages in one case and not in another. If you look at the judgments of Tindal, C.J.,[1] and Parke, B.,[2] they seem rather to contemplate the case where all the provisions are of one kind: Parke, B., says: "if there be a contract consisting of one or more stipulations, the breach of which," meaning, I think, of each of which, "cannot be measured, then the parties must be taken to have meant that the sum agreed on was to be liquidated damages and not a penalty." On this principle, if there were no more in the covenant than what I have read, this would clearly be a case of liquidated damages. But then it is argued that this covenant does contain a provision, the breach of which is estimable in damages, it being qualified by the words "except as thereinafter and hereinafter mentioned;" and afterward comes the exception, which authorizes the defendant to practise midwifery where the fees amount to as much as £1 1*s.*, "but he shall pay one half of the fees which he shall receive for each of such midwifery cases unto the" plaintiff, so long as the plaintiff shall be alive. It is said that for any one breach of this provision the defendant, taking the damages as liquidated, might be called upon to pay £2000, and this, putting the instance as a proof of the absurdity of the results for a non-payment of a single half guinea; and that therefore the £2000 must be in the nature of a penalty, not of liquidated damages. I should not yield to the argument suggested from the mere disproportion of the sums; there must be a line drawn somewhere; and a man who goes a hair's breadth beyond it brings himself within the stipulation. In a general covenant not to practise within a certain distance of a spot named, the difference may be so small as to produce an appearance of hardship, as if, for instance, the covenanter practised one yard within the distance named. But that is not the main question; the question is whether this forms part of the covenant. It is a part of that which is excepted from the covenant. The very notion of an exception is this: you shall do certain things in a certain way; still there are some of those things which you may do in another way. Here, had there been an attempt to recover the £2000 on the ground that the defendant, having practised in a midwifery case where the fee exceeded a guinea,

[1] 6 Bing. 147 (E. C. L. R., Vol. XIX.). [2] 4 Exch. 782.

had not paid over the half to the plaintiff, the attempt must clearly have failed. On these grounds I think that the rule should be discharged, and that the verdict should stand for £2000.

ERLE, J. The defendant, upon entering on an arrangement with plaintiff, covenants with him that, after the expiration of three years, he will not practise as a surgeon, except in a limited manner. It is found that he has broken this covenant. It is stipulated that, if he does break the covenant, he shall pay £2000. The question is, whether he is to pay that sum. In very clear language, he has expressed that he will do so. From the nature of the contract, the damages for the breach of it are clearly undefined ; it is impossible, on ascertaining the fact that any one or more breaches have been committed, to say with certainty what damages have resulted : they might be the loss of a fortune, or only the loss of the amount of a particular bill. They are therefore undefined ; and it is clear that in such case the covenantee is to have the £2000. But it is said that there is a rule of construction according to which, when the stipulations are of a particular kind, the stipulation for payment of the sum named counts for nothing, and the judges presume that the parties meant only to make the contract generally, and the words expressing that a sum named is to be paid as liquidated damages are merely formal. No doubt there may be such a contract in law. If a man borrows £100 upon the security of a money bond for £200, from early times relief would be given upon payment of interest and principal. That has been also carried out in the case of covenants, where the payment of wages, or other sums certain, is covenanted for, and a large sum named is made payable upon a breach. The Courts have extended the above-mentioned rule of construction to such a case, saying that the naming of the large sum means only that so much shall be paid as is actually due. The direction of later decisions has rather been to restrict this rule, which indeed supersedes an important principle of law, that parties are to assign such limits as they please to their own liability. If parties choose to lay down such a limit, I do not see why the judges are to substitute another ; and the tendency latterly has been very much to restrict the rule of construction. Certainly in some of the cases it was a very large exercise of the power of the Court, to say, we will see what we should have thought reasonable, and to construe the contract accordingly ; and later cases, ending with Atykns *v.* Kinnier, 4 Exch. 782, tend the other way ; it was a very strong absurdity, as it seems to me, when a party had said, I know to what extent I can per-

form and I will pay so much if I do not perform, to say that upon his non-performance he should not pay so much. If the courts can limit the contract one way they might limit it the other ; and then a party might have to pay a larger sum than he ever meant to pay. The damages are here, I think, indefinite ; and the parties have expressed the sum which ought to be paid. It is said, however, that a part of the covenant is to pay half of the fees received in particular cases. But that is not a part of the covenant in respect of which the liquidated damages are agreed upon ; that covenant is, not to practise ; it was quite collateral to that to agree that, if the defendant received certain money he should pay a part to the plaintiff ; in the case of non-payment of that, the plaintiff would have a right of action, but not for the £2000.

Rule discharged.[1]

BIGNALL *v.* GOULD.

IN THE SUPREME COURT OF THE UNITED STATES,
DECEMBER 20, 1886.

[*Reported in* 119 *United States Reports* 495.]

THIS was an action brought in September, 1881, by a citizen of Missouri against a citizen of New York upon the following bond, signed and sealed by the defendant :

" Know all men that I, James H. Gould, of Seneca Falls, New York, am held and firmly bound to Moses C. Bignall in the penal sum of ten thousand dollars lawful money, liquidated damages, to the payment of which I bind myself, my heirs, executors, administrators, and assigns, firmly by these presents.

" Sealed with my seal at the city of St. Louis and State of Missouri, this 7th day of April, A.D. 1879.

" The condition of this obligation is such that whereas on the 1st day of April, 1878, the said Moses C. Bignall became unable to pay and satisfy all his just debts and liabilities and whereas the Gould Manufacturing Company, of Seneca Falls aforesaid, was one of the creditors of the said Moses C. Bignall and whereas the said Gould Manufacturing Company, Mrs. Hannah B. Gould, of Seneca Falls, and Angus McDonald, of Rochester, New York, became the assignees by purchase of a large number and amount of the said debts and claims then existing against the said Moses C. Bignall ; and whereas said last-named parties, or either of them, may deem it to their

[1] The concurring opinion of Crompton, J., has been omitted.—ED.

interest to become the assignees of other of said debts and claims now existing against said Moses C. Bignall :

" Now, therefore, if the said Gould Manufacturing Company, the said Hannah B. Gould, and the said Angus McDonald, shall acquit, release and discharge the said Moses C. Bignall, within one year from the date hereof, of all and singular the debts and claims aforesaid, that have been assigned to them, or that may hereafter be assigned to them, or either of them, by good and sufficient release in writing, to be made by them, and to be delivered by them to said Moses C. Bignall, then this obligation to be void ; otherwise, it shall remain in full force and virtue."

The petition alleged that the defendant executed the bond at its date ; that the plaintiff was then owing to divers persons debts amounting to about $50,000, including one to the Gould Manufacturing Company of about $7000, and that Hannah B. Gould held assignments from different persons of many of those debts, to the amount of about $26,000 (a list of ten of which was annexed, varying from $147.23 to $8117), and Angus McDonald held assignments of like debts to the amount of about $6000 (a list of thirteen of which was annexed, varying from $9.80 to $1445.52) ; that there had been a breach of the bond, in that more than a year had elapsed since its execution, yet neither the Gould Manufacturing Company nor Gould nor McDonald had acquitted, released, or discharged the plaintiff from any of those debts, and that by reason of this breach the plaintiff had been damaged in the sum of $10,000.

The answer admitted these allegations, except that it denied that the plaintiff had been damaged in the sum of $10,000 or any other sum ; and alleged that the plaintiff, under proceedings in bankruptcy pending at the date of the bond, had since obtained a certificate of discharge, whereby all his debts mentioned in the petition were discharged. The plaintiff filed a replication, denying all the allegations of the answer.

Upon a trial by the Court, a jury having duly been waived, the plaintiff proved that the assets which came to the hands of his assignee in bankruptcy amounted to $23,109.54, and no more, of which $17,439.11 was collected of the Gould Manufacturing Company, and that the only dividend paid was on March 14th, 1882, of $46\frac{1}{100}$ cents on the dollar. The plaintiff admitted in open Court that he obtained a certificate of discharge on May 6th, 1880, under proceedings in bankruptcy begun on April 25th, 1878. The defendant relied on this admission, and introduced no evidence. No other testimony was given nor admissions made at the trial, save those contained in the pleadings.

The plaintiff asked the Court to declare the following propositions of law as applicable to this case : " First, the bond sued on is a liquidated bond, and the breach being admitted by the defendant, the plaintiff is entitled to recover the liquidated sum, $10,000 ; second, if the bond is not a liquidated bond, still, under the issues and the evidence, the plaintiff is entitled to recover more than nominal damages, notwithstanding his discharge in bankruptcy." The Court refused thus to declare the law, and rendered judgment for the plaintiff, and assessed his damages at one cent only. The plaintiff excepted to the ruling and action of the Court, and sued out this writ of error.

H. M. Pollard (with whom was *S. N. Taylor*) for plaintiff.

No appearance for defendant.

GRAY, J., after stating the case as above reported, delivered the opinion of the Court.

By the rules now established, at law as well as in equity, the sum of $10,000, named in this bond, is a penalty only, and not liquidated damages. As observed by Lord Tenterden in a similar case, " whoever framed this agreement does not appear to have had any very clear idea of the distinction between a penalty and liquidated damages ; for the sum" in question " is described in the same sentence as a penal sum and as liquidated damages." Davies *v.* Penton, 6 B. & C. 216, 222 ; S. C. 9 D. & R. 369, 376. The object of the bond is to secure the obligee's discharge from a large number of claims against him, held by certain third persons severally, amounting in all to something like $39,000, and varying from more than $8000 to less than $10 each. A failure of either of those persons to release any one of those claims would be a breach of the bond ; and for any such breach a just compensation might be estimated in damages. The sum of $10,000 must, therefore, be regarded as simply a penalty to secure the payment of such damages as the obligee may suffer from any breach of the bond. Watts *v.* Camors, 115 U. S. 353 ; Boys *v.* Ancell, 5 Bing. N. C. 390 ; S. C. 7 Scott, 364 ; Thompson *v.* Hudson, L. R. 4 H. L. 1, 30 ; Fisk *v.* Gray, 11 Allen, 132.

Upon the evidence introduced and the admissions made by the plaintiff at the trial, it does not appear that he suffered any damage whatever. Although there was a technical breach of the bond at the expiration of a year from its date, by the third persons therein named having failed to release the plaintiff from any of the debts held by them, yet, within a month afterward, and before this action was brought, he was legally discharged from all those debts by obtaining a certificate of discharge in bankruptcy. This discharge was not the less

complete and effectual because the creditors had not received payment in full, nor because the plaintiff might, if he saw fit, by new promises to them, waive the discharge and revive so much of the debts as had not been satisfied by the dividends paid by the assignee in bankruptcy.

Judgment for nominal damages affirmed.

LAW *v.* LOCAL BOARD OF REDDITCH.

IN THE COURT OF APPEAL, NOVEMBER 26, 1891.

[*Reported in Law Reports*, 1 *Queen's Bench*, (1892).]

APPEAL from the judgment of Hawkins, J., at the trial without a jury.

The facts were as follows. The plaintiff sued for the price of work done by him under a contract with the defendants for the construction of certain sewerage works. The defendants paid money into Court and counter-claimed £160 as being due to them by way of liquidated damages for delay in completion of the works under the contract. By the contract the plaintiff contracted, that in consideration of the sum of £630, to be paid as thereinafter stated, he would, in a good, substantial, and workmanlike manner, and with materials sufficient and proper of their several kinds, execute, perform, and complete all and singular the works and things mentioned, or described in, or implied by, or reasonably to be inferred from, the contract and specification thereunto annexed, and thereinafter called "the works," according to the said specification and plans. There were in the contract and specification a number of stipulations with regard to the conduct of the works by the contractor which it is unnecessary to set out, and it was provided that "the works shall be completed in all respects, and cleared of all implements, tackle, impediments, and rubbish, on or before April 30th, 1889, to the satisfaction of the said surveyor, to be testified by a certificate under his hand, and, in default of such completion, the contractor shall forfeit and pay to the urban authority the sum of £100 and £5 for every seven days during which the works shall be incomplete after the said time, and the sums so forfeited may be recovered by the urban authority from the contractor as and for liquidated damages." There was also a clause providing that in default of the due performance and execution of the terms of the contract by the contractor, he should pay to the urban authority the sum of

£200 as and for liquidated damages for the breach of the contract, in addition to any other penalties, forfeitures, and damages to which he might be liable under the contract. The works were not completed until after April 30th, 1889, and the defendants claimed to be entitled to the sum of £100 and £5 per week for twelve weeks, as being the period during which they remained incomplete after that date.

The case ultimately turned wholly on the question whether the sums of £100 and £5 per week mentioned in the contract were penalties or liquidated damages, the parties agreeing at the trial that, if the sum of £160 was entirely penalties, the judgment should be for the plaintiff for £75; if the sum of £100 was penalty, but the sum of £60 was liquidated damages, then the judgment should be for the plaintiff for £40; and if the sum of £160 or £100 was liquidated damages, then the judgment should be for the defendants. The learned judge was of opinion that the £100 and £5 per week mentioned in the contract were liquidated damages and not penalties, and therefore gave judgment for the defendants.

Jelf, Q.C., and *C. F. Vachell* for the plaintiff.

Hugo Young and *R. Harington* for the defendants.

Lord ESHER, M.R. In this case it does not seem to me to be necessary to go through all the cases that have been decided on the subject. One rule which appears to be recognized in the cases as a canon of construction with regard to agreements of this kind is that, where the parties to a contract have agreed that, in case of one of the parties doing or omitting to do some one thing, he shall pay a specific sum to the other as damages, as a general rule such sum is to be regarded by the Court as liquidated damages and not a penalty. One recognized exception to such rule is where a sum of money is to be payable upon the non-payment of a smaller specified sum, in which case the Courts have treated the larger sum as a penalty, not as liquidated damages; and I should think that another exception would be where the sum agreed to be paid is, with regard to the matter in respect of which it is agreed to be paid, so large as to make the idea that it was intended to be payable by way of liquidated damages so absurd that the Court would be compelled to arrive at the conclusion that it was to be paid, not as liquidated damages, but as a penalty. There are other cases in which the parties to a contract have agreed that the one is to pay and the other to be paid a sum of money in respect of the doing or failure to do any of a number of different things of very different degrees of importance. It has been laid down in cases of this kind, as a general rule at any rate, that such

sum of money is to be regarded as a penalty, not as liquidated damages. But with regard to this class of cases there are many questions of difficulty which may arise and may have to be considered hereafter, but with which we need not, as it seems to me, trouble ourselves in this case. If these sums of £100 and £5 a week are to be paid in respect of the failure by the contractor to do one single thing, and if there is only one event in respect of which they are to be paid, then the case comes within the general rule of construction which has been recognized in all the cases from the time of the judgment of Heath, J., in Astley *v.* Weldon,[1] down to what Lord Herschell said in Lord Elphinstone *v.* Monkland Iron and Coal Co.[2] in the House of Lords, and those sums must, therefore, be treated as liquidated damages. We have to construe this contract by the light of that rule of construction. If, on the true construction of this contract, there is only one event in respect of which the sums of money specified are to be paid, then they are to be regarded as liquidated damages and not as penalties. The contract is for the construction of drainage works, and the material portion of it is as follows: "The works (*i.e.*, the drainage works) shall be completed in all respects and cleared of all implements, tackle, impediments, and rubbish on or before April 30th, 1889." Those are, as it seems to me, two distinct matters which have to be done by April 30th. But then the contract goes on to say, that "in default of such completion the contractor shall forfeit and pay to the urban authority the sum of £100 and £5 for every seven days during which the works shall be incomplete after the said time." Two things are mentioned previously, completion of the works and clearing them of implements, etc. The default mentioned is of "such completion." Why is "completion" there to be construed in a different sense from that which it bore in the earlier part of the clause, where it was spoken of as distinct from the clearing of the works from implements, etc.? There seems to me to be only one event on which the liability to pay the sums mentioned depends, viz., non-completion of the works by the time specified. Then the contract goes on to say that the sums so forfeited may be recovered "as and for liquidated damages." I do not think much reliance ought to be placed on those words, for, even if the sums were called penalties, the same considerations might be applicable; but I do not think that they ought to be left out of account altogether. It seems to me that they go somewhat to show that the parties intended that these sums should be liquidated damages and not penal-

[1] 2 B. & P. 346. [2] 11 App. Cas. 332.

ties. If the true construction of the contract be what I have stated, viz., that the amount mentioned is to be paid in respect of the non-completion of the works by the specified time and not of the failure to clear them of implements, etc., then it seems to me that all ground for the suggestion that the event on which the sum is to be paid is "multitudinous" entirely disappears, and there is only one event upon which it becomes payable. But, assuming that the true construction of the contract is otherwise, I think then the same result follows. The works are to be completed and cleared, and both these matters are to be completed by April 30th. In default of "such completion" the payment is to be made. So that in that case also there is only one event on which the payment is to be made. For these reasons, I think that, according to the well-recognized rule of construction, these were liquidated damages and not penalties, and therefore that the judgment of the learned judge was right, and this appeal should be dismissed.

LOPES, L.J. The question is whether the sums of £100 and £5 per week, mentioned in this contract, are penalties or liquidated damages. In the contract they are spoken of as "liquidated damages;" but too much reliance must not be placed on that, because it is clear that the use by the parties of the expression "penalty" or "liquidated damages" is not conclusive. The distinction between penalties and liquidated damages depends on the intention of the parties to be gathered from the whole of the contract. If the intention is to secure performance of the contract by the imposition of a fine or penalty, then the sum specified is a penalty; but if, on the other hand, the intention is to assess the damages for breach of the contract, it is liquidated damages. There is a canon of construction which has been referred to by the Master of the Rolls, according to which, if the sum is payable on the happening or non-happening of one event, it is to be regarded as liquidated damages; but if, on the other hand, it is payable on the happening of several events, some of which would entail very trifling damage, then it is to be regarded as a penalty. For the purpose of applying that rule to the present case, it is necessary first to construe the contract. The material words are, "the works shall be completed in all respects, and cleared of all implements, tackle, impediments, and rubbish, on or before April 30th, 1889." I think that two events are here contemplated, one being the completion of the works, the other the removal of the tackle, etc. These are separate matters. Then the contract says, that "in default of such completion" the sums in question shall become payable. In my view those

words do not refer to the clearance of the works, but to the completion of the works mentioned in the first part of the clause. According to the construction which I put upon the contract, only one event is contemplated as that upon which the sums mentioned are to become payable, viz., the non-completion of the works by the specified day. That being so, it seems to me that those sums are liquidated damages. In support of this view, I would refer to what Lord Herschell said in Lord Elphinstone *v.* Monkland Iron and Coal Co.[1] He said : " The agreement does not provide for payment of a lump sum upon the non-performance of any one of many obligations differing in importance. It has reference to a single obligation, and the sum to be paid bears a strict proportion to the extent to which that obligation is left unfulfilled. There is nothing whatever to show that the compensation is inordinate or extravagant in relation to the damage sustained, and provision is made that the payment is to bear interest from the date when the obligation is unfulfilled. I know of no authority for holding that a payment agreed to be made under such conditions as these is to be regarded as a penalty only ; and I see no sound reason or principle, or even convenience, in so holding." The opinion so expressed seems to me to be entirely in accordance with what we are now holding with regard to the construction of this contract.

Kay, L.J. This contract contains a provision that a lump sum of £100 and £5 for every seven days during which the works remain incomplete after April 30th, 1889, may be recovered " as and for liquidated damages." What the meaning of these words is, and why they were inserted in the contract, a short statement of the law on the subject may assist in showing. In early times it was decided by Courts of Equity that, where a sum of money was agreed to be paid as a penalty for non-performance of a collateral contract, equity would not allow the whole sum to be recovered ; but, where the damages for non-performance of such contract could be estimated, would cut down the penalty to the amount of the actual damages sustained. One of the earliest cases on the subject is Peachy *v.* Duke of Somerset,[2] where Lord Macclesfield says, that " the true ground of relief against penalties is from the original intent of the case, where the penalty is designed only to secure money and the Court gives him all that he expected or desired." The doctrine so stated was afterward modified and extended to other cases than the security of money by Lord Thurlow in Sloman *v.* Walter,[3] where he says : " The

[1] 11 App. Cas. 332. [2] 1 Str. 447. [3] 1 Bro. C. C. 418.

rule that, where a penalty is inserted merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered as the principal intent of the deed, and the penalty only as accessional, and therefore only to secure the damage really incurred, is too strongly established in equity to be shaken." In that case the sum to be paid was to secure to the defendant the use of a certain room, and Lord Thurlow, considering that it was in the nature of a penalty, and not of assessed damages, granted an injunction against a suit for the recovery of it. Therefore it became a settled rule in equity that, where a sum was agreed to be paid in respect of the performance or non-performance of a collateral matter, the actual damages for which could be estimated, the penalty would be cut down, and only the actual damages sustained would be allowed. It was for that very reason that the words "as and for liquidated damages," and similar words, came to be inserted in contracts. The contracting parties meant by the use of them to exclude this rule of equity, and to say that the sum agreed upon should be considered not to be a penalty, but the amount which they themselves assess as being the damages which would be incurred in the event of the contract being broken. It was to avoid the interference of Courts of Equity that such words were introduced. But then the Courts of Law interfered, and, as it seems to me, went further than Courts of Equity had done originally. They held that, though the parties had expressly said that the sum agreed to be paid was liquidated damages and not a penalty, they would construe the agreement as meaning that it should be a penalty. One of the leading cases at Common Law in which a sum agreed to be paid for breach of contract was treated as a penalty is Astley *v.* Weldon,[1] where Heath, J., said: "Where articles contain covenants for the performance of several things, and then one large sum is stated at the end to be paid upon breach of performance, that must be considered as a penalty. But where it is agreed that, if a party do such a particular thing, such a sum shall be paid by him, there the sum stated may be treated as liquidated damages." Again, in Kemble *v.* Farren,[2] though the contract expressly stated that the sum mentioned was to be paid as liquidated damages, the Court, seeing that it was to be paid on performance or non-performance of a number of matters, some of which would involve very inconsiderable damages, treated it merely as a penalty. If any one desires to read a very elaborate exposition of the cases on this subject, he will find it in the judgment of Jessel, M.R., in Wallis *v.* Smith.[3]

[1] 2 B. & P. 346 [2] 6 Bing. 141. [3] 21 Ch. D. 243.

It was, no doubt, a very serious intereference with the terms of a contract to say that, though the parties had expressly stipulated that a sum was to be paid as liquidated damages, the Court would not allow the words to have their ordinary effect, but would treat the sum as a penalty. That has never been done, so far as I am aware, except in cases like Kemble *v.* Farren,[1] where the damages were made payable, not on one single event, but on a number of events, some of which might result in very inconsiderable damages. In that case the Court applied a construction which was contrary to the very words which the parties themselves had used. We have to consider within which class of cases the present comes—whether this is a case where a sum is made payable upon several events, some of which are of small importance, or whether it is a case in which it is made payable upon only one event. I will not repeat what the Master of the Rolls has said for the purpose of showing that upon the true construction of this contract the sums mentioned are made payable on one event only, viz., the non-completion of the works by the specified time. I agree that the other matter referred to, viz., the clearing away of the rubbish, etc., is not part of the matter the non-completion of which is the event upon which the money is to become payable. The words are, "The works shall be completed in all respects, and cleared," thus showing that the clearance is something extra, beyond the completion in all respects. The money is to be payable on non-completion. But even if the contract is to be read as meaning that the work shall be completed and that completion shall include clearance from implements, etc., I think that there is only one event, viz., completion of the works, on which the liquidated damages are to become payable.

I cannot agree with the ingenious argument that, because there may be many matters, some very small, which would constitute non-completion, these sums may be regarded as payable on several events. According to that argument, there must be considered to be several different non-completions of the works. There may be different causes of non-completion; but non-completion is only one single event. For these reasons I agree that this appeal should be dismissed.

Appeal dismissed.

[1] 6 Bing. 141.

PART III.

DISCHARGE OF CONTRACTS.

CHAPTER VIII.

RESCISSION.

TAYLOR *v.* HILARY.

In the Exchequer, Hilary Term, 1835.

[*Reported in* 1 *Crompton, Meeson & Roscoe* 741.]

Assumpsit. The declaration stated that in consideration that the plaintiff, at the special instance and request of the defendant, would allow one Henry Holt to have goods as he might want them, not exceeding in the whole £200, the defendant undertook and promised the plaintiff to guarantee the payment of such goods; and the plaintiff averred that he, confiding, etc., did afterward, to wit, etc., sell and deliver to the said Henry Holt certain goods of great value, not exceeding in the whole £200; to wit, of the value of £190, as he, the said Henry Holt, did want them; of which the defendant afterward, to wit, on, etc., had notice. Breach, that Henry Holt had not paid for the said goods or any part thereof, nor had the defendant, although often requested, paid for the same or any part thereof. Plea, that after the making of the promise and undertaking in that count mentioned, and before any breach thereof, to wit, on the day and year aforesaid, it was, at the special instance and request of the plaintiff, agreed by and between the plaintiff and defendant that the plaintiff should supply to the said Henry Holt £200 worth of goods as he should want them, and that such goods should be paid for at the end of three months by a joint bill at four months accepted by the defendant, which agreement of the defendant he, the plaintiff, before any breach

of the promise and undertaking in the said count mentioned, accepted, in full discharge of that promise and undertaking, and thereby then wholly released and discharged the defendant from the further performance of that promise and undertaking. Verification.

To this plea the plaintiff demurred, and alleged as cause of demurrer that there was no material difference between the agreement set out in the count and that set out in the plea, and that the only difference applied to the time of credit to be given ; and that it did not appear by the said plea, but that the agreement therein mentioned had been fully carried into effect by the plaintiff, and the time of credit expired.

Barstow in support of the demurrer. The plea is insufficient, for the reasons assigned in the demurrer. It does not in substance state an agreement differing from that set up by the plaintiff. [Parke, B. It differs in this, that it states an agreement to pay by a bill at four months, while the agreement as stated in the declaration was merely to guarantee.] Then the agreement set forth in the plea is not shown to be binding upon the defendant, being an undertaking for the debt of another, it ought to have been shown to be in writing, according to the Statute of Frauds, and signed. There is a distinction between declaring upon and pleading such a contract ; in the latter case it must be shown to possess the requisites of the statute in order that it may appear to the Court that an action will lie upon it, for he shall not be allowed to take away the plaintiff's action without giving him another. Case *v.* Barber, Sir Thomas Raymond, 450. [Parke, B. The first agreement was a guarantee, but according to the second agreement the defendant became absolutely bound as an original debtor. In order to bring the case within the authority cited, it must be shown that the second agreement was a guarantee.] The plea is bad upon another ground. It does not show that the time of credit given by the bill is still continuing. In cases of goods sold on credit, if the credit has expired, the plaintiff may sue on the implied contract ; and if the defendant sets up as a defence that the credit has not expired, it must, since the new rules, be specially pleaded, according to a late decision of the Court of King's Bench, Edmunds *v.* Harris, 4 Nev. & M. 182. [Parke, B. I believe some doubts have been expressed with regard to that decision. If the time of credit has not expired, the plaintiff proves a different contract from that which he has stated in his declaration—viz., to pay on request.]

Per CURIAM. Before the breach of the first agreement a new agreement is entered into, varying the contract in an essential

part, the time of payment. The latter, then, is a substituted contract, and is an answer to an action upon the former. The plea is not a plea of accord and satisfaction, and does not therefore require an averment of performance.

Barstow had leave to amend.

Crowder in support of the plea.

SPENCE *v.* HEALEY.

IN THE EXCHEQUER, APRIL 27, 1853.

[*Reported in* 8 *Exchequer* 668.]

THE declaration stated that one John Edward Spicer, by deed, covenanted with the plaintiff, that, upon the expiration of six calendar months after the said J. E. Spicer received notice in writing from the plaintiff requiring the said J. E. Spicer so to do, such six calendar months to be computed from the service of the said notice, he, the said J. E. Spicer, would repay to the plaintiff a certain sum of £1500; and the defendant, by the said deed, also covenanted with the plaintiff, that, upon the expiration of six calendar months after the said J. E. Spicer and the defendant received a notice in writing as aforesaid from the plaintiff requiring the repayment of the said £1500 as aforesaid, he, the said J. E. Spicer, or the defendant would pay to the plaintiff the sum of £1000, parcel of the said £1500; and the plaintiff avers that the said J. E. Spicer and the defendant have respectively received notice in writing from the plaintiff requiring the said J. E. Spicer to repay to the plaintiff the said sum of £1500; and, although six calendar months, computed from the service of the said notice according to the said deed, have elapsed before action brought, yet neither the said J. E. Spicer nor the defendant have paid the said £1000 according to the said covenant, and although the plaintiff has been satisfied £800, parcel thereof, the residue remains unpaid.

The defendant pleaded, secondly, that before action and before any breach of the said covenant, he satisfied and discharged the plaintiff's claim by delivering to him goods, machinery, fixtures, and chattels.

Demurrer and joinder.

Hugh Hill in support of the demurrer.

Brewer, *contra*.

PARKE, B. The plea is bad. Wherever damages only are

sought to be recovered, such a plea affords a good answer to the action ; but where the covenant is for the payment of a sum certain, the covenantee has a right to object that the discharge is not by deed.

MARTIN, B. I am sorry that I am compelled to agree in holding that the plea is bad. It is difficult to see the correctness of the reasons upon which the rule is founded.

POLLOCK, C.B., and PLATT, B., concurred.

Judgment for the plaintiff.

KING *v.* GILLETT.

IN THE EXCHEQUER, TRINITY TERM, 1840.

[*Reported in* 7 *Meeson & Welsby* 55.]

ASSUMPSIT for the breach of a promise to marry the plaintiff in a reasonable time. The declaration was in the usual form, alleging mutual promises to marry. Plea, that after the making of the promise in the declaration mentioned, and before any breach thereof by the defendant, to wit, on, etc., the plaintiff wholly absolved, exonerated, and discharged the defendant from his promise and the performance of the same. Verification.

Special demurrer, assigning for causes, that the plea consists wholly of matter of law, on which no *assumpsit* nor material issue can be taken ; that the facts which constitute the discharge alleged by the defendant ought to have been set out, in order that the judgment of the Court might have been taken as to their constituting such discharge or not, or otherwise that issue might have been taken on some material fact so alleged ; and that the allegations in the plea are much too general, and therefore no traverse can be safely taken, so as to bring any distinct matter of fact in issue, etc. Joinder in demurrer.

The following points of argument were stated in the margin : The plaintiff will contend that a contract founded on mutual promises can only be rescinded before breach by mutual consent ; and that a mere discharge by one of the parties, without any act of the other party, is incomplete. The defendant will contend that a promise may be discharged by parol before breach, and that it is not necessary in pleading to state the evidence of such discharge, or the special circumstances under which it arises, or that there was any consideration for the same.

The case was argued in Trinity Term, by

E. Perry in support of the demurrer.

Montague Smith in support of the plea.

The judgment of the Court was now delivered by

ALDERSON, B. In this case we are of opinion that the plea is good, and that the demurrer must be overruled.

The question before the Court was this, whether to an action founded on mutual promises to marry within a reasonable time the defendant could plead that, before any breach of contract on his part, the plaintiff wholly exonerated him from the performance of that contract. And it was contended that the proper plea was, that before breach, the plaintiff and defendant by mutual agreement had rescinded the contract previously made between them. No doubt such a plea would be good, but on looking into the precedents to which we have been referred, we find that the form of the present plea has been adopted and held good in several cases. There are precedents in several of the books of entries,[1] and there are two decided authorities, Holland and Conier's Case, 2 Leon. 214, and Langden *v.* Stokes, Cro. Car. 383. And we think this latter case explains the matter, and reconciles the present plea with general principles. It seems to have been treated there as a mere question of the form of plea—and so we think it is, for although we are of opinion that this plea is good in point of form, yet we think the defendant will not be able to succeed upon it at *nisi prius*, in case issue be taken upon it, unless he proves a proposition to exonerate on the part of the plaintiff, acceded to by himself ; and this in effect will be a rescinding of the contract previously made.

We think, therefore, that judgment must be given for the defendant, but the plaintiff should have liberty to amend on payment of costs.

Leave to amend accordingly.

THORNHILL AND ANOTHER *v.* NEATS.

IN THE COMMON PLEAS, JUNE 22, 1860.

[*Reported in* 8 *Common Bench Reports* 831.]

THIS was an action for money payable by the defendant to the plaintiffs for goods sold and delivered by the plaintiffs to the defendant, and for work done and materials provided by the plaintiffs for the defendant at his request, and for money

[1] Rast. Entr. 685 ; Brown's Entr. 67 (fol edit.) ; Hern's Pleader, 31.

paid by the plaintiffs for the defendant at his request, and for money found to be due from the defendant to the plaintiffs upon accounts stated between them. Claim, £1500.

Fourth plea—as of the sum of £72, parcel of the money claimed for and in respect of work done and materials provided by the plaintiffs for the defendant—that the greatest part of the work and materials in the declaration mentioned were done and provided under an agreement in writing dated November 8th, 1858, made between the defendant of the one part and the plaintiffs of the other part ; by which agreement the plaintiffs agreed with the defendant to build, execute, and completely finish for him, fit for habitation, three houses entire, and to do every description of work required to be done to the three carcases adjoining, and their appurtenances, so as to completely finish them for the defendant in a good, substantial, and workmanlike manner, to the satisfaction of John Thomas, the defendant's surveyor, and to commence the works immediately on signing the contract, and completely finish and give up the premises on or before March 20th, 1859, under a penalty of £1 for each house for each and every week the works should remain incomplete, and possession withheld from the defendant after that date ; and by which agreement the defendant agreed with the plaintiffs, that, in consideration of the due performance of the said works, and on the certificate of the said John Thomas that the works were done to his satisfaction, to pay to the plaintiffs the sum of £1198 18*s.* 6*d.* in manner in the said agreement mentioned ; and by the said agreement the amount of the penalty thereinbefore mentioned was to be paid out of the moneys due, or which might become due, to the plaintiffs under the agreement ; that the greatest part of the plaintiffs' claim for work done and materials provided is for and in respect of the said work done and materials provided by the plaintiffs under the said agreement, and exceeds the sum of £72, parcel, etc., and is claimed as due to them from the defendant under the said agreement ; that the plaintiffs did not proceed with or build or execute the said works to the satisfaction of the said John Thomas, and that the plaintiffs did not completely finish or give up the said houses, works, and premises mentioned in the said agreement on or before the said March 20th, 1859 ; but the whole of the said houses, works, and premises in the said agreement mentioned were delayed, and remained incomplete, and possession was withheld from the defendant for twelve weeks next after and beyond the said March 20th, 1859, whereby the defendant, under and according to the said agreement, became and was and is entitled to pay him-

self and to deduct, and does accordingly pay himself and deduct out of the moneys due and claimed to be due to the plaintiffs under the said agreement, the sum of £1 per week for each of the said houses, for each and every week of the said twelve weeks the said work so remained incomplete and possession withheld from the defendant after the said March 20th, 1859, amounting together to the sum of £72.

Second replication to the fourth plea, on equitable grounds, that the defendant ought not to receive from the plaintiffs any of the said moneys so alleged to be forfeited, by way of penalties, as in the said plea mentioned, or deduct the amount of such alleged penalties out of any moneys payable by the defendant to the plaintiffs in respect of work done, labor performed, and materials provided under the said agreement in the said fourth plea mentioned, because they, the plaintiffs, said that, after the making of the said agreement, and before any of the said alleged penalties had been incurred, it was mutually agreed between the plaintiffs and the defendant that the plaintiffs should perform certain other work, and bestow other labor, and provide other materials in, upon, and for the said houses, in addition to the work, labor, and materials in the said first-mentioned agreement contained, upon certain other terms—that is to say, that the plaintiffs should perform the said work in that replication mentioned within a reasonable time for so doing in that behalf ; that the said work in that replication mentioned was so mixed up with the said work upon the said premises in the said agreement mentioned, being part and parcel thereof, that it became impossible to complete the said works and premises in the said agreement mentioned until the said additional works in that replication mentioned were also completed, as the defendant, at the time of making the said agreement in the replication mentioned always well knew ; that they, the plaintiffs, had performed all the terms of the said agreement in that replication mentioned on their part to be performed, and had completed the said works in the said agreement in that replication mentioned within a reasonable time, and also at the same time completed the said works and premises in the said agreement in the said fourth plea mentioned, and forthwith gave up possession of the same to the defendant ; and that, using all due and reasonable despatch in that behalf, it was impossible to have completed the said works and premises mentioned in the said agreement in the said fourth plea mentioned in accordance with the terms and at the time in that agreement mentioned, in consequence and by reason of the premises therein mentioned ; and that the defendant entered

upon and took possession of, and then had the full benefit and enjoyment of the said additional works in the replication mentioned, and the said works in the said fourth plea mentioned, the same being fully completed within the said reasonable time as aforesaid.

Third replication to the fourth plea, that before any breach of the said agreement in that plea mentioned, and before the plaintiffs had incurred or become subject or liable to any penalties for the non-completion of the said work in accordance therewith, it was mutually agreed by and between the plaintiffs and defendant, for good consideration in that behalf, that so much of the said agreement as related to the completion and giving up and finishing of the said premises on or before the said March 20th, 1859, under certain penalties if the same were not so given up and finished, should be, and the same was rescinded.

The defendant demurred to the second replication to the fourth plea, the ground stated in the margin being "that the replication does not show that the delay in the completion of the works mentioned in the agreement in the fourth plea was the act of the defendant alone." Joinder.

Kinglake in support of the demurrer.

Grant, *contra*.

WILLIAMS, J. I am of opinion that the replication to the fourth plea is a good replication, and that the plaintiff is entitled to judgment on this demurrer. It is unnecessary to say whether the replication might be sustained as a good equitable replication. It is enough to say that some members of the Court entertain grave doubts, on the ground that it does not show that all that could be done toward the performance of the first agreement had been done by the plaintiffs. But we are all agreed that on legal grounds the replication is a good answer to the plea. The plea in substance states that the work was done and the materials provided under an agreement in writing by which the plaintiffs agreed with the defendant to build and completely finish certain houses for him fit for habitation by March 20th, 1859, under what is called a penalty of £1 for each house for every week the work should remain incomplete and possession withheld from the defendant after that date; that the amount of the penalty was to be paid out of the moneys due or which might become due to the plaintiffs under the agreement; that the plaintiffs did not completely finish the houses on or before March 20th, but possession was withheld from the defendant for twelve weeks, and therefore the defendant claimed to deduct from the moneys due to the plaintiffs

the sum of £72. The replication denies that the penalty was ever incurred in point of fact or of law. It alleges that, after the making of the agreement mentioned in the plea, and before any of the alleged penalties had been incurred, it was mutually agreed between the plaintiffs and the defendant that the plaintiffs should perform certain other work upon the houses in addition to the work in the first agreement contained upon the terms that the plaintiffs should perform the last-mentioned work within a reasonable time ; that the last-mentioned work was so mixed up with the work upon the premises in the first agreement mentioned, being part and parcel thereof, that it became impossible to complete the works in the first agreement mentioned until the additional works were also completed, as the defendant at the time of making the second agreement mentioned always well knew ; that the plaintiffs completed the work in the second agreement mentioned within a reasonable time, and also at the same time completed the works in the first agreement mentioned, and forthwith gave up possession of the same to the defendant ; and that, using all due and reasonable despatch in that behalf it was impossible to have completed the works in the first agreement mentioned in accordance with the terms and at the time in that agreement mentioned, in consequence and by reason of the premises in the declaration mentioned. In substance the allegation is, that the defendant, with knowledge that the new work rendered it impracticable to complete the work first contracted to be done within the time stipulated, makes an agreement that the new work shall be done, and that the plaintiffs shall do that work, not within the time fixed by the original contract, but within a reasonable time. It appears to me that the second agreement operated as a waiver of the stipulation as to time in the first agreement, and a consent that the performance of the work thereunder shall be postponed until after the lapse of the reasonable time provided for the performance of the work under the second agreement. This, as it seems to me, is nothing more or less than a waiver of the penalties, and affords a good answer to the fourth plea.

Judgment for the plaintiffs.[1]

[1] The concurring opinions of Willes, Byles, and Keating, JJ., have been omitted.—ED.

NOBLE *v.* WARD AND OTHERS.

IN THE EXCHEQUER CHAMBER, FEBRUARY, 1867.

[*Reported in Law Reports, 2 Exchequer*, 135.]

APPEAL from the judgment of the Court of Exchequer making absolute a rule to set aside a nonsuit, and for a new trial.

Holker (*Baylis* with him) for the appealing defendants.

Mellish, Q.C. (*Jones, Q.C.*, with him) for the plaintiff.

WILLES, J. This is an appeal from the judgment of the Court of Exchequer making absolute a rule to set aside a nonsuit, and for a new trial. The action was brought for non-acceptance of goods pursuant to a contract dated August 18th, by which the goods were to be delivered in a certain time. The defendants pleaded that the contract was rescinded by mutual consent. At the trial they established that on September 27th, before any breach of that contract, it was agreed between the plaintiff and the defendants that a previous contract of August 12th should be rescinded (as to which no question is made), that the time for delivering under the contract of the 18th should be extended for a fortnight ; and other provisions were made as to taking back certain goods, which we need not further notice. The contract of September 27th, however, was invalid for want of compliance with the formalities required by § 17 of the Statute of Frauds. The defendants contended that the effect of the contract to extend the time for delivery was to rescind the contract of August 18th ; and if the former contract had been in a legal form, so as to be binding on the parties, that contention might have been successful, so far as a change in the mode of carrying out a contract can be said to be a rescission of it ; but the defendants maintained that the effect was the same, although the contract was invalid. In setting aside the nonsuit directed by the learned judge who tried the cause, the Court of Exchequer dissented from that view, and held that what took place on the 27th must be taken as an entirety, that the agreement then made could not be looked on as valid, and that no rescission could be effected by an invalid contract. And we are of opinion that the Court of Exchequer was right. Holker has contended, that though the contract of September 27th cannot be looked on as a valid contract in the way intended by the parties, yet since, if valid, it would have had the effect of rescinding the contract of the 18th, and since the parties might have entered into a mere verbal contract to rescind *simpliciter*,

we are to say that what would have resulted if the contract had been valid will take place though the contract is void ; or, in other words, that the transaction will have the effect which, had it been valid, the parties would have intended, though without expressing it, although it cannot operate as they intended and expressed. But it would be at least a question for the jury, whether the parties did intend to rescind, whether the transaction was one which could not otherwise operate according to their intention ; and a material fact on that point is that, while they expressly rescinded the contract of August 12th, they simply made a contract as to the carrying into effect that of the 18th, though in a mode different from what was at first contemplated. It is quite in accordance with the cases of Doe d. Egremont *v.* Courtenay[1] and Doe d. Biddulph *v.* Poole,[2] overruling the previous decision of Doe d. Egremont *v.* Forwood,[3] to hold that, where parties enter into a contract which would have the effect of rescinding a previous one, but which cannot operate according to their intention, the new contract shall not operate to affect the previously existing rights. This is good sense and sound reasoning, on which a jury might at least hold that there was no such intention. And if direct authority were wanted to sustain this conclusion, it is supplied by Moore *v.* Campbell[4] where, upon a plea of rescission, the very point was taken by Sir Hugh Hill, who would no doubt have made it good had it been capable of being established. With reference to his argument that the contract was rescinded, Parke, B., said :[5] " We do not think that this plea was proved by the evidence. The parties never meant to rescind the old agreement absolutely, which the plea, we think, imports. If a new valid agreement substituted for the old one before breach would have supported the plea, we need not inquire, for the agreement was void, there being neither note in writing, nor part payment, nor delivery, nor acceptance of part or all ;" and he adds, " this was decided by the cases of Stead *v.* Dawber[6] and Marshall *v.* Lynn."[7] As to the cases cited from East, too much importance has been attached to them. The first case[8] amounts to no more than this, that the Court was bound to construe the contract before it without regard to the stamp, and having done so, then to see how the Stamp Acts operated upon it. In the second case[9] it was held that, although the Stamp Acts operated

[1] 11 Q. B. 702.
[2] *Ibid.* 713.
[3] 3 Q. B. 627 ; see 11 Q. B. 723.
[4] 10 Ex. 323 ; 23 L. J. (Ex.) 310.
[5] 10 Ex. at p. 332.
[6] 10 Ad. & E. 57.
[7] 6 M. & W. 109.
[8] Hill *v.* Patton, 8 East, 373.
[9] French *v.* Patton, 9 East, 351.

to prevent the plaintiff from recovering upon the policy as altered, that circumstance could not enable him to recover upon it in its original form, when he had himself consented to the alteration of the written words.

BLACKBURN, MELLOR, MONTAGUE SMITH, and LUSH, JJ., concurred.

Judgment affirmed.

NATHANIEL S. COLLYER & CO. *v.* LEWMAN MOULTON AND ANOTHER.

IN THE SUPREME COURT OF RHODE ISLAND, OCTOBER TERM, 1868.

[*Reported in* 9 *Rhode Island* 90.]

ASSUMPSIT to recover the sum of $481.90 for a wire-bending machine, so called, constructed for the defendants by the plaintiffs. The declaration contained a count on book account, and the ordinary money counts, and also a special count alleging that the defendants, on January 23d, 1865, in consideration that the plaintiffs would make for them a certain wire-bending machine, promised to pay them therefor upon the delivery thereof what the same should be reasonably worth; that the plaintiffs, confiding in the defendants' promises, made and finished said machine; that it was reasonably worth $481.90; that they tendered said machine to the defendants on March 31st, 1865, and requested them to pay said sum of $481.90 therefor, which the defendants refused, and still do refuse to do, etc.

Plea, the general issue.

A jury trial having been waived, the case was heard by the Court both in fact and law. The facts are stated sufficiently in the opinion of the Court.

P. E. Tillinghast for plaintiffs.

Thurston, Ripley & Co. for defendants.

POTTER, J. The plaintiffs made a verbal contract with the defendants, then partners, to build a machine. The work was charged as fast as done, and the materials when furnished. After a small part of the work had been done, the firm was dissolved; and the defendant Moulton, the same day, gave notice of it to the plaintiffs, and told them he could be no longer responsible for the machine. The defendant Moulton claims that the plaintiffs released him and agreed to look to the other partner for payment; but this the plaintiffs deny. The plaintiffs went on and completed the machine, and then sued Bromley

alone for his claim, but discontinued the suit, and now sue both the former partners, the writ having been served on Moulton only.

Where two parties contract, one to do a particular piece of work and the other to pay for it, the latter may, at any time, countermand the completion of it, and in such case the former cannot go on and complete the work and claim the whole price, but will be entitled only to pay for his part performance, and to be compensated for his loss on the remainder of the contract. Clark *v.* Marmlier, 1 Denio, 317 ; Durkee *v.* Mott, 8 Barb. S. C. 423 ; Hosmer *v.* Wilson, 7 Michigan, 294.

In the present case the two defendants, although the partnership was dissolved, still remained joint contractors so far as the plaintiff was concerned ; and we think that either of them had a right to countermand the order before completion, and then the joint contractors would have remained liable as before stated. But the defendant Moulton claims that he was verbally released by the plaintiffs, and that the plaintiffs agreed to look to the other defendant, Bromley, alone for their pay.

There is some apparent inconsistency in the language used in the reports and text writers, as to the manner in which a simple contract may be annulled. We think the rule is, that so long and so far as the contract remains executory and before breach, it may be annulled by agreement of all parties ; but that when it has been broken and a right of action has accrued, the debt or damages can only be released for a consideration ; and even so far as it remains executory, it may be said that the agreement to annul on one side may be taken as the consideration for the agreement to annul on the other side. Yane 5, 112 ; Johnson *v.* Reed, 9 Mass. 84 ; Cummings *v.* Arnold, 3 Met. 486–489 ; Richardson *v.* Hooper, 13 Pick. 446 ; Blood *v.* Enos, 12 Vermont, 625.

So far, therefore, as the contract in the present case remained unfinished on February 10th, 1865, when the notice was given and the alleged waiver was made, we may consider, either that the contract was annulled or waived by consent, in which case (the machine, so far as completed, being tendered or delivered) the plaintiff could claim only for work and materials to that date without further damages, or that the work was countermanded by the defendant Moulton, without the assent of the plaintiffs, in which case the defendant would be liable for the part performed and for loss on the part unperformed.

We consider the present case to fall under the first head, the notice to, and declarations and conduct of the plaintiffs amounting to a waiver of the fulfilment of the contract as first made—

that is, to a release of the defendant Moulton for the part still unperformed.

But the claim for payment for the part performed, stands, as we have seen, on a different ground. Was there any agreement to release Moulton from liability for this—that is, the part performed ; and if so, was there any agreement to take the other partner's individual promise in lieu of the promise of the firm, or anything which would amount to a consideration for the release of the firm ?

If, by mutual arrangement between the plaintiff Collyer and the two defendants, Moulton had been released from his liability for the work already done, and a new promise made by Bromley, the other defendant, to pay for it, this would have been a valid release for a valuable consideration, one debt would have been substituted for the other. Thompson *v.* Percival, 5 B. & A. 925.

But we cannot find sufficient evidence of any promise on the part of the other partner, Bromley, to assume the liability ; and if there was none, then the release of liability for the work already done was without consideration, as it is not claimed that there was any other consideration.

We cannot find, however, any count in the declaration upon which, upon this view of the case, we can allow for anything except labor done before February 10th, the day of the giving of the notice.

Judgment for plaintiffs for amount so found due.

WILLIAM McCREERY ET AL., APPELLANTS, *v.* MELVILLE C. DAY ET AL., RESPONDENTS.

IN THE COURT OF APPEALS OF NEW YORK, JANUARY 14, 1890.

[*Reported in* 119 *New York Reports* 1.]

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made May 24th, 1889, which affirmed a judgment in favor of defendants, entered upon an order of Special Term granting a motion for judgment on the pleadings.

This action was brought to recover certain sums alleged to be due plaintiffs under a contract dated March 2d, 1882, between the plaintiffs, as parties of the first part, and C. H. Andrews, as party of the second part, and C. K. Garrison, defendant's testator, as party of the third part.

By the terms of the contract, plaintiffs sold to Garrison a one-fourth interest in a contract for the construction of the railroad of the Pittsburgh, Youngstown & Chicago Railroad Company, running from Pittsburgh to Akron, and agreed to turn over to Garrison a one-fourth part of all cash, bonds, and stock which should be received from that railroad company in payment for the work done under the construction contract. Garrison agreed to pay the plaintiffs for work already done and materials furnished and rights acquired up to the date of the contract, the sum of $150,000, and pay them, from time to time thereafter, one fourth of the amounts expended by them in the further construction of the road under the contract.

Plaintiffs sought to recover the one-fourth part of moneys expended by them after March 2d, 1882, in carrying out their contract with the Pittsburgh, Youngstown & Chicago Railroad Company, and also to recover interest during the time Garrison delayed payment of the sum of $150,000.

The answer set up, among other things, the following facts: On April 13th, 1882, the plaintiffs and said C. H. Andrews executed an agreement with the Pittsburgh & Western Railroad Company, by which the plaintiffs and C. H. Andrews agreed to sell to the Pittsburgh & Western Railroad Company a one-fourth interest in the Pittsburgh, Youngstown & Chicago Railroad, as described, between Newcastle Junction and Akron, for $150,000, those persons agreeing to pay for all expenditures for work done or materials furnished up to that date. The Pittsburgh, Youngstown & Chicago Railroad Company was to abandon the further construction of the projected railroad between the towns of Newcastle Junction and Akron, for the building of which railroad between those points the Pittsburgh, Cleveland & Toledo Railroad Company was created. On November 6th, 1882, Garrison, the defendants' testator, wrote to the plaintiffs and to C. H. Andrews a letter acknowledging the receipt of the papers designed for the completion of the road from Akron to Newcastle Junction by the Pittsburgh & Western Railroad, consenting to sign them, but only on the understanding and condition "that I am not to pay any more money than Mr. Humphrey's company" (the Pittsburgh & Western) "pays, as provided in the agreement you made with him April 13th—that is, $150,000 and one fourth of the cost of the road to Newcastle Junction after that date." Garrison in the same letter asserted that he had given up the agreement of March 2d above mentioned, and declared that he no longer desired any interest in the railroad from Newcastle Junction to Pittsburgh. Afterward, and in compliance with the terms of that letter, the plain-

tiffs, with the said C. H. Andrews and the defendants' testator, caused an agreement to be endorsed on the contract of March 2d, 1882, as follows: "It is agreed by the parties hereto that the within contract is annulled and of no further effect, the same having been superseded by the agreement and arrangement made in lieu thereof, as embodied in the letter of C. K. Garrison . . . dated November 6th, 1882, and by a certain agreement made between C. H. Andrews, W. C. Andrews, W. McCreery, James Gallerey, Solomon Humphrey, and C. K. Garrison, all bearing date October 25th, 1882." This writing was signed by all the parties.

The agreement last referred to was fully carried out by all the parties. An order was made requiring plaintiffs to reply, which they did, substantially admitting the foregoing averments of the answer.

J. W. Hawes for appellants.

William Bronk and *Melville C. Day* for respondents.

ANDREWS, J. The parties by their agreement endorsed on the contract of March 2d, 1882, in terms annulled that contract and declared that it should be of no further effect. The claim that the annulment of the contract did not discharge Garrison's obligation under the original contract to pay his proportion of expenditures made by the plaintiffs for the construction of the Pittsburgh, Youngstown & Chicago Railroad, between the date of the contract and its annulment, depends on the intention to be deduced from the agreement of annulment, construed in light of the attending circumstances. Where a contract is rescinded while in the course of performance, any claim in respect of performance, or of what has been paid or received thereon, will ordinarily "be referred to the agreement of rescission, and in general no such claim can be made unless expressly or impliedly reserved upon the rescission." Leake on Contracts, 788, and cases cited.

The agreement annulling the original contract recites that the contract had been "superseded by agreements and arrangements made in lieu thereof," embodied in Garrison's letter of November 6th, 1882, and the several contracts executed by the parties to that contract, and others, bearing date October 25th, 1882. In ascertaining the scope of the agreement annulling the original contract, the letter and the contracts of October 25th, 1882, are to be deemed incorporated into the agreement. Construing these several writings together, they plainly show that the parties intended that Garrison should be discharged from all liability under his contract of March 2d, 1882, for any expenditures theretofore made, or thereafter to be made

in constructing the line between Pittsburgh and Newcastle Junction. The letter was written after Garrison had received the contracts dated October 25th, 1882, for execution, and declares that he will sign them on the condition, and understanding that he is not to pay anything more than Mr. Humphrey's company pays, under the plaintiff's agreement with him of April 13th, 1882—"that is, $150,000, and one fourth of the cost of the road to Newcastle Junction after that date." The agreement with Mr. Humphrey, of April 13th, 1882, provided for the construction of the part of the line of the Pittsburgh, Youngstown & Chicago Railroad between Newcastle Junction and Akron, by a new corporation to be formed, and that Humphrey should pay the plaintiffs $150,000 for expenditures incurred and rights acquired on that branch of the road, prior to the making of the contract, and also one fourth of all expenditures thereafter made in its completion. The letter goes on to state that the agreement with Mr. Humphrey was made "after consulting with me, and, as it insured my road (Wheeling & Lake Erie Railroad) a line to Pittsburgh, I was ready to assent to it in place of the agreement of March 2d, and you know I have so considered it since, and that I was owner of one fourth of the new company, all previous agreements between us being superseded. I do not want any interest in the road from Newcastle Junction to Pittsburgh. I will pay whatever Mr. Humphrey's company has paid on the agreement of April 13th."

The clear import of the proposition of Mr. Garrison in his letter is, that he would sign the contracts of October 25th, 1882, provided he should be placed in the same position in respect to the enterprise, as that occupied by the company represented by Mr. Humphrey, and be relieved from all interest in, or obligation to contribute to the construction of the part of the Pittsburgh, Youngstown & Chicago Railroad between Pittsburgh and Newcastle Junction. Garrison, thereafter, executed the contracts of October 25th, 1882, relating to the construction of the road between Newcastle Junction and Akron, whereby he assumed other and different obligations from those he had assumed by his contract with the plaintiffs of March 2d, 1882.

The main claim in the action is to recover from Garrison's estate, under the contract of March 2d, 1882, for a share of expenditures made by the plaintiffs in the construction of the part of the Pittsburgh, Youngstown & Chicago Railroad between Pittsburgh and Newcastle Junction, after the date of that contract, and before the execution of the annulment agreement. The agreement annulling the prior contract is supported by an adequate consideration. The new obligation which Garrison

assumed under the contracts of October 25th, 1882, was alone a sufficient consideration. City of Memphis *v.* Brown, 20 Wall. 289. There was a consideration also in the mutual agreement of the parties to the prior contract (which was still executory, although in the course of performance) to discharge each other from reciprocal obligations thereunder and to substitute a new and different agreement in place thereof.

The contract of March 2d, 1882, is sealed, while the agreement annulling it is unsealed. Upon this fact the plaintiffs make a point, founded on the doctrine of the common law, that a contract under seal cannot be dissolved by a new parol executory agreement, although supported by a good and valuable consideration, "for every contract or agreement ought to be dissolved by matter of as high a nature as the first deed." Countess of Rutland's Case, Coke, Pt. V., 25*b*. The application of this rule often produced great inconvenience and injustice, and the rule itself has been overlaid with distinctions invented by the judges of the common law courts to escape or mitigate its rigor in particular cases. But in equity the form of the new agreement is not regarded, and under the recent blending of the jurisdiction of law and equity, and the right given by the modern rules of procedure in this country and in England to interpose equitable defences in legal actions, the common law rule has lost much of its former importance. A recent English writer, referring to the effect of the common law Procedure Acts in England, says: "The ancient technical rule of the common law, that a contract under seal cannot be varied or discharged by a parol agreement, is thus practically superseded." Leake on Contracts, 802. Courts of equity often interfered by injunction to restrain proceedings at law to enforce judgments, covenants, or obligations equitably discharged by transactions of which courts of law had no cognizance. 2 Sto. Eq., § 1573. It is a necessary consequence of our changed system of procedure, that whatever formerly would have constituted a good ground in equity for restraining the enforcement of a covenant, or decreeing its discharge, will now constitute a good equitable defence to an action on the covenant itself. It was one of the subtle distinctions of the common law as to the discharge of covenants by matter *in pais*, that although a specialty before breach could not be discharged by a parol agreement, although founded on a good consideration, nor even by an accord and satisfaction, yet after breach the damages, if unliquidated, could be discharged by an executed parol agreement, because, as was said, in the latter case the cause of action is founded "not merely on the deed, but on the deed and the

subsequent wrong." Broom's Legal Maxims, 848, and cases cited. The absurd results to which the common law doctrine sometimes led is illustrated by the case of Spence *v.* Healey, 8 Exch. 668, in which it was held that a plea to an action on covenant for the payment of a sum certain, that before breach defendant satisfied the covenant by the delivery to, and acceptance by the plaintiff, of goods, machinery, etc., in satisfaction, was bad, Martin, B., saying: "I am sorry I am compelled to agree in holding that the plea is bad. It is difficult to see the correctness of the reason upon which the rule is founded." I suppose there can be no doubt that the facts presented by the plea in the case of Spence *v.* Healey would have constituted a good ground for relief in equity. The technical distinction between a satisfaction before or after breach seems to have been disregarded in this state, and a new agreement by parol, followed by actual performance of the substituted agreement, whether made and executed before or after breach, is treated as a good accord and satisfaction of the covenant. Fleming *v.* Gilbert, 3 John. 530; Lattimore *v.* Harsen, 14 John. 330; Dearborn *v.* Cross, 7 Cow. 48. Allen *v.* Jaquish, Cowen, J., 21 Wend. 633. So also a new agreement, although without performance, if based on a good consideration, will be a satisfaction if accepted as such. Kromer *v.* Heim, 75 N.Y. 574, and cases cited.

In the present case it may be justly said that when the agreement annulling the contract of March 2d, 1882, was executed, there had been no breach by Garrison of his covenant therein, as he had not been called upon by the plaintiffs to pay his share of the construction account. But it was the plain intention of the parties that the new arrangement, then entered into, should be a substitute for the liability of Garrison, present and prospective, under the contract of March 2d, 1882. The transaction constituted a new agreement in satisfaction of the prior covenant, and was accepted as such. Moreover, it admitted by the reply that the contracts of October 25th, 1882, were carried out. It is a case, therefore, of an executory parol contract, made in substitution of the prior sealed contract, afterward fully executed, which clearly, under the authorities in this State discharged the prior contract.

In respect to the claim to recover interest during the time the payment of the $150,000 was delayed, it is a sufficient answer that the complaint admits that the principal sum was fully paid prior to September 13th, 1882. The claim for interest did not survive, there being no special circumstances to take the case out of the general rule. Cutter *v.* Mayor, etc., 92 N. Y. 166, and cases cited.

We are of opinion that the facts admitted in the pleadings disclose that there was no right of action, and that the complaint, for this reason, was properly dismissed.

The judgment should therefore be affirmed.

All concur.

Judgment affirmed.

LEMON THOMSON, RESPONDENT, *v.* JOHN O. POOR AND CHARLES C. POOR, APPELLANTS.

IN THE COURT OF APPEALS OF NEW YORK, NOVEMBER 26, 1895.

[*Reported in* 147 *New York Reports* 402.]

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made February 15th, 1893, which affirmed a judgment in favor of plaintiff entered upon a decision of the Court on trial at Circuit before the Court without a jury.

This action was brought to recover a balance claimed to be due under a contract.

On April 1st, 1885, the parties entered into a contract in writing under seal for the sale by the plaintiff to the defendants of the bark on the hemlock trees on the "Harris" lot, owned by the plaintiff, at a specified price per cord, to be peeled by the defendants, 800 to 1000 cords in 1885, and not less than 1000 cords in each year thereafter. The defendants were to pay on January 1st in each year for the bark peeled during the previous year. The complaint alleges that in the year 1886 the defendants peeled 935 cords, but paid for it only in part, and alleged that there was still due and owing for the bark so peeled the sum of $752.82. The answer denied certain of the allegations in the complaint, and set up as an affirmative defence that in the year 1885, after the making of the written contract of April 1st, 1885, the parties thereto, by an agreement between them, modified and changed the contract by limiting the amount of bark which the defendants should be required to peel in the year 1886 to 500 cords, and alleged performance of the modified contract. The plaintiff, on the trial, to maintain his cause of action, proved the written contract of April 1st, 1885, and also proved and put in evidence, under objection, a certain contract made by him with one Wakeley, dated August 3d, 1885, to cut and deliver all the hemlock, spruce, and pine logs on the Harris lot "in such manner as to comply with the agreement for peeling and selling the hemlock bark on said lot."

He also gave proof that the defendants had peeled and paid for during 1886 only 500 cords of bark. The plaintiff having rested, the defendants moved for a non-suit on several grounds, and, among others, that the plaintiff had failed to prove the cause of action alleged in the complaint. The motion was denied. The defendants then proved that their tannery where the bark was to be used was burned in July, 1885, and then offered to prove a conversation between their agent and the plaintiff in November, 1885, which proof was objected to by the plaintiff on several grounds: First, that its only relevancy would be to prove the agreement alleged in the answer, which was an agreement to extend the time for peeling the bark and not for extending the time of payment; second, that a sealed contract could not be changed by an oral agreement made without consideration before breach; third, that the written contract being for the sale of an interest in lands (required to be in writing) could not be added to or varied by any oral contract.

Thereupon, before the objection was ruled upon, the defendants offered to prove in substance that in November or December, 1885, the defendants entered into an oral contract with the plaintiff reducing the quantity of bark to be cut and peeled in each year to 500 cords, conditioned upon such change being made satisfactory to Wakeley and that the defendants performed the condition, and on February 25th, 1886, they entered into a written contract with Wakeley to peel all the bark on the "Harris" lot for them for a price fixed, 500 cords in the season of 1886 and 500 cords in each year thereafter, or more, to the extent of 1000 cords a year if the defendants should so elect; that on the same day (February 25th, 1886) they entered into a contract with the firm of Shaw & Co. to sell to that firm all the bark they had agreed to purchase of the plaintiff, to be delivered only in quantities of 500 cords a year, and all their rights under the contract with the plaintiff of April 1st, 1885, as modified by the agreement of November or December, 1885; that the contracts made by the defendants with Wakeley and Shaw & Co. were entered into by them in consideration of the modified contract made by them with the plaintiff in November or December, 1885, and that they would not have been made except by reason thereof; that the defendants agreed to pay Wakeley a larger sum for peeling the bark than they would otherwise have paid except for his agreement to peel 500 cords and no more annually; that in pursuance of the several agreements the defendants peeled 500 cords in 1886, and paid therefor for the work of peeling and the purchase-price as provided in the several contracts, and have performed their several con-

tracts, and that they fully performed the contract of April 1st, 1885, as changed and modified ; that the plaintiff had knowledge of all the facts offered to be proved as they transpired. It was admitted in connection with the offer that the contracts made by the defendants with Wakeley and Shaw & Co. formed the only consideration upon which the oral contract of modification of November or December, 1885, can rest. The plaintiff objected to the proof offered upon the same grounds upon which he objected to the proof of the proposed conversation, adding thereto the objection of want of consideration for the alleged modified agreement. The Court rejected the proof offered, and no further proof being given by either party, the case was submitted. The judgment proceeded on the ground that the defendants, by not peeling more than 500 cords of bark in the year 1886, had broken their contract, and that plaintiff was entitled to recover the purchase-price thereof, and judgment was rendered in favor of the plaintiff for $757.82 with interest.

J. S. L'Amoreaux for appellants.

Isaac Lawson for respondent.

ANDREWS, C.J. It was assumed by both parties on the argument that under the case of Green *v.* Armstrong, 1 Den. 550, the contract of April 1st, 1885, for the sale by the plaintiff to the defendants of the bark on the hemlock trees on the "Harris" lot, to be peeled by the purchaser, was a contract for the sale of an interest in lands required by the Statute of Frauds to be in writing. We shall determine the case upon this assumption without examination of its correctness. See Nettleton *v.* Sikes, 8 Met. 34. The contract was, in fact, in writing, and its validity is not questioned. The stress of the argument at the bar related to the competency of the evidence offered by the defendants to prove the oral modification of the original contract, made in the fall of 1885, by which the plaintiff, on the request of the defendants, consented on the condition that it was made satisfactory to Wakeley, the contractor with the plaintiff to do the lumbering on the lot, to reduce the amount of bark to be peeled by the defendants during each of the years subsequent to 1885 to 500 cords per year. The plaintiff's counsel, in support of his objection to the competency of the evidence (which was ruled in his favor by the trial judge), relies upon the general principle that a written contract, falling within the Statute of Frauds, cannot be varied by any subsequent agreement of the parties unless such new agreement is also in writing. The further objection that a sealed contract, irrespective of its character, cannot be changed by a subsequent parol executory agree-

ment under the maxim *quodque dissolvitur eodem ligamine quo ligatur*, and the objection that the consent of the plaintiff to reduce the quantity of the bark to be peeled in each year was conditional, will be referred to after considering the objection founded upon the Statute of Frauds.

In disposing of this objection it is important to notice that the controversy in the present action relates solely to the performance of the contract of April 1st, 1885, as respects the year 1886. By that contract the defendants were to peel in that year not less than 1000 cords. In fact, they peeled only 500 cords, and they allege as an excuse for not peeling the full 1000 cords in that year, the oral agreement made in the fall of 1885. The effect of the oral agreement if made and valid as a contract was to change the terms of the original written agreement as to the time and manner of performance. It did not diminish the aggregate amount of bark to be peeled and taken by the defendants, but it extended the time within which it was to be peeled and taken to double the time fixed by the original contract, and as a necessary incident extended the right of entry for the same period, and meanwhile during such extended period, by natural growth of the trees, bark might be brought within the sale, which otherwise would not come within the contract. If we were now required to decide the question whether a contract in writing within the Statute of Frauds can be altered as to the time of performance by a subsequent oral executory agreement made between the parties upon sufficient consideration, we should find the question under the authorities involved in distressing perplexity. It is now the settled doctrine of the English courts, contrary to the earlier rule declared in Cuff *v.* Penn, 1 M. & S. 21, that such a contract cannot be changed as to the mode or time of performance by an oral executory contract. Stead *v.* Dawber, 10 Ad. & El. 57; Hickman *v.* Haynes, L. R., 10 C. P. 598. In many of the States in this country the courts have adopted the rule laid down by Lord Ellenborough, in Cuff *v.* Penn, *supra*, and have held such proof admissible on the distinction between the contract which it was said the statute requires to be in writing and its performance, to which the statute does not apply. This is the rule in Massachusetts, New Hampshire, Maine, Ohio, and Pennsylvania, and, perhaps, other States. The cases are referred to in a note in Wood on Frauds, p. 758. In this State the rule does not seem to be authoritatively settled. In Blood *v.* Goodrich, 9 Wend. 68, Savage, C.J., expressed the opinion that the time of performance of a written contract for the sale of land could not be enlarged by parol, but the case was decided

on another ground. There are dicta in this Court, and some decisions in other courts of the State to the contrary. Blanchard *v.* Trim, 38 N. Y. 225; Flynn *v.* McKeon, 6 Duer, 203; Stone *v.* Sprague, 20 Barb. 509. But we deem it unnecessary to determine this important question here, for the reason that, without disputing the doctrine contended for by the learned counsel for the plaintiff, that the oral agreement sought to be proved was inadmissible to change the terms of the written contract, it was competent to establish, in connection with other facts offered to be shown, a waiver by the plaintiff of the requirements of the original contract that the defendants should peel 1000 cords of bark in 1886, which had been acted upon and become executed by the lapse of time before the commencement of the action. We know of no principle of law which will permit a party to a contract, who is entitled to demand the performance by the other party of some act within a specified time, and who has consented to the postponement of the performance to a time subsequent to that fixed by the contract, and where the other party has acted upon such consent and in reliance thereon has permitted the contract time to pass without performance, to subsequently recall such consent and treat the non-performance within the original time as a breach of the contract. The original contract is not changed by such waiver, but it stands as an answer to the other party who seeks to recover damages for non-performance induced by an unrecalled consent. The party may, in the absence of a valid and binding agreement to extend the time, revoke his consent so far as it has not been acted upon, but it would be most inequitable to hold that a default, justified by the consent, happening during its extension, should furnish a ground of action. It makes no difference, as we conceive, what the character of the original contract may be, whether one within or outside the Statute of Frauds. The rule is well understood that if there is forbearance at the request of a party, the latter is precluded from insisting upon non-performance at the time originally fixed by the contract as a ground of action. The case is not as manifest where the party who solicited the forbearance alleges the consent of the other party as an excuse for non-performance. But in such a case, where one party to a contract, before the time for performance by the other party has arrived, consents, upon his request, to extend the time of performance, he must be presumed to know that the other party relies upon the consent, and until he gives notice of withdrawal he has no just right to consider the latter in default, although meanwhile the contract time has elapsed. We think the principle of equitable estoppel

applies in such case. See Pierrepont *v.* Barnard, 6 N. Y. 279 ; Hoadly *v.* M'Laine, 10 Bing. 482 ; Leather Co. *v.* Hieronimous, L. R., 10 Q. B. 140 ; Longfellow *v.* Moore, 102 Ill. 289. The proof offered by the defendants, if it had been received, would have permitted the inference that the omission of the defendants to peel more than 500 cords of bark in the year 1886 was owing to the oral arrangement unrevoked, which, if it did not amount to an enforceable contract, operated nevertheless to excuse the alleged breach.

The objection that a sealed contract can only be changed by a contract of equal solemnity according to the principle of the common law to which we have adverted (assuming that the principle has any longer any practical existence, see McCreery *v.* Day, 119 N. Y. 1), is answered by what has been said on the subject of waiver which applies equally to sealed and unsealed contracts. The objection that the modified agreement was conditional is met by the offer which by fair construction included an offer to prove that the proposed limitation of the amount of bark to be peeled was made satisfactory to Wakeley. The learned counsel for the plaintiff criticises the offer of proof as indefinite and as not in some respects conforming to the defence in the answer. The plaintiff is not in a position to insist upon great exactness in these respects in view of the character of his own pleading and the ground upon which the recovery proceeded. We think the offer fairly disclosed the substantial matter of defence, and although it treated the modified agreement as a binding contract, the proof offered, though it may have been ineffectual to accomplish that result, would we think upon the case as disclosed by the record, if received, have authorized the inference of a waiver completely executed.

The judgment should be reversed and a new trial granted.

All concur.

Judgment reversed.

BRIDGET E. HASTINGS AND ANOTHER *v.* ARTHUR B. LOVEJOY.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, OCTOBER 22, 1885.

[*Reported in* 140 *Massachusetts Reports* 261.]

CONTRACT against the surviving partner of the firm of J. Lovejoy & Sons, to recover a balance of rent reserved in a lease under seal of certain premises for the term of ten years from June 24th, 1873, at an annual rental of $12,500, payable quar-

terly on the 24th days of March, June, September, and December in each year respectively. Trial in this court, before Field, J., who reported the case for the determination of the full Court, in substance as follows :

The only question in the case related to the four years from December 24th, 1876, to December 24th, 1880, inclusive, the plaintiffs claiming to recover an alleged balance due for these years, and the defendant contending that the plaintiffs had been fully paid all rent due during said four years.

The testimony of the defendant was in substance as follows : the premises were occupied by him for the sale of carpets In the fall of 1876, business having been dull, and for a time having been conducted at a loss, he sought the plaintiffs, and represented to them that his business was unprofitable, that he was unable to pay the full rental of the premises, and stated to them that he should fail in business unless the rental was reduced. The plaintiffs thereupon verbally agreed to reduce the rental for the term of one year, beginning with December 24th, 1876 (the commencement of a quarter under the lease), by the sum of $2000, so that the same should be $10,500 per annum for that year. This reduced rent the defendant paid, when or after it became payable during that year, by negotiable checks, and the plaintiffs received the same without objection, and gave receipts for the same each quarter in the manner following : "$3125. Boston, April 2d, 1877. Received of J. Lovejoy & Sons three thousand one hundred and twenty-five dollars in full for rent store 178 and 179 Tremont Street to March 24th. P. J. & B. E. Hastings." At each quarterly payment, the sum of $2625 only was paid by the defendant, according to said verbal agreement.

In the fall of 1877, the defendant was desirous of taking a partner into the firm, and putting in more capital, and informed the plaintiffs that business was still dull, and he was still unable to pay the full rental of the premises, and that he should be obliged to fail unless the rent was reduced for the ensuing three years. The defendant also offered to prove that he said to the plaintiffs that, if the rent should be reduced by the sum of $2500 per annum, he would take in a partner for the ensuing three years, and would borrow the sum of $40,000, and put the same into the business. The defendant testified that the plaintiffs thereupon agreed to reduce the rent for the three years commencing December 24th, 1877, by the sum of $2500 per annum, so that the same should be $10,000 per annum for those years.

The defendant offered to prove that he thereupon admitted said partner, and raised said sum of $40,000 and put it into the

business ; and testified that he paid this reduced rental, when or after it became payable, for the quarter ending March 24th, 1878, by his negotiable check, and the plaintiffs gave him the following receipt therefor : " $3125. Boston, April 1st, 1878. Received of J. Lovejoy & Sons thirty-one hundred and twenty-five dollars in full to March 24th of rental 178 and 179 Tremont Street, as per lease. P. J. & B. E. Hastings." But no receipt in full was ever given thereafter.

No evidence was offered that the plaintiffs ever agreed to accept the new partner or the new firm as a tenant, or claimed to hold for the rent any persons except those who executed the lease.

In June, 1878, the first-named plaintiff filed a bill in equity against her husband, the other plaintiff, charging certain irregularities on his part in the management of these premises, and a receiver was appointed, who continued to manage the premises and collect the rents thereof from June 24th, 1878, to January, 1880.

During this time the defendant paid, by negotiable checks or notes, the reduced rental to the receiver, after but not as it became payable, with the exception of the quarter ending December 24th, 1880 (which he paid to the plaintiffs), the plaintiffs upon each payment authorizing the receiver to receive such reduced rental ; but no receipts in full were given therefor.

At the termination of the receivership, the receiver filed his account, containing the items of rental received, and the same was assented to by the plaintiffs' counsel, and allowed by this Court.

After the termination of the receivership, the defendant paid to the plaintiffs, by negotiable checks, the reduced rental only, after but not as it became payable, until the termination of said term of three years, which expired on December 24th, 1880, but no receipts were given therefor.

The plaintiffs received the amounts so paid without objection, and without demanding any further payment of rent, or demanding the full rent reserved under the lease, until on or about October 1st, 1880, when they contended that the defendant should pay full rent for the year 1880, and presented a bill for the same.

After December 24th, 1880, the defendant resumed the payment of the full rental reserved in the lease. The lease expired June 24th, 1883, and the defendant thereupon surrendered the premises.

The judge ruled, against the objection of the defendant, that the above evidence and offer of evidence, if received, and if

believed by the jury, would not authorize a finding that the plaintiffs were not entitled to the balance of rental during these four years, being the difference between the rent paid by virtue of the verbal agreement and the rent reserved in the lease— namely, the sum of $2000 for the first year and the sum of $2500 for each of the other three years ; and the defendant stating that he had no other defence to the action, the judge directed the jury to return a verdict for the plaintiffs for the full amount claimed.

If the ruling was correct, the verdict was to stand ; otherwise a new trial to be granted.

G. A. Torrey (*T. F. Nutter* with him) for the defendant.

A. E. Pillsbury for the plaintiffs.

C. ALLEN, J. While recognizing and giving effect to the rule of law, that a creditor cannot bind himself by a simple agreement to accept a smaller sum in lieu of an ascertained existing debt of a larger amount, because such agreement is without consideration, courts have nevertheless often declared that the rule is not to be extended beyond its precise import, and, especially if a consideration for such agreement is found to exist, of which the law can take notice, that courts will not inquire into its adequacy. Langdon *v.* Langdon, 4 Gray, 186 ; Brooks *v.* White, 2 Met. 283 ; Simmons *v.* Almy, 103 Mass. 33. The question what will constitute a sufficient consideration for such agreement has been discussed in many cases. See Fitch *v.* Sutton, 5 Eas. 230 ; Brooks *v.* White, *ubi supra ;* Perkins *v.* Lockwood, 100 Mass. 249 ; Train *v.* Gold, 5 Pick. 380 ; Warren *v.* Skinner, 20 Conn. 559 ; Met. Con. 192 ; 1 Smith's Lead. Cas. (8th Am. ed.) 644.

It is also now well settled, that ordinarily a written contract, before breach, may be varied by a subsequent oral agreement, made on a sufficient consideration, as to the terms of it which are to be observed in the future. Such a subsequent oral agreement may enlarge the time of performance, or may vary any other terms of the contract, or may waive and discharge it altogether. Cummings *v.* Arnold, 3 Met. 486, 489 ; Holmes *v.* Doane, 9 Cush. 135 ; Goodrich *v.* Longley, 4 Gray, 379, 383 ; Emery *v.* Boston Ins. Co., 138 Mass. 398 ; Goss *v.* Nugent, 5 B. & Ad. 58.

This rule in Massachusetts has been held applicable to a case where the original contract fell within the operation of the Statute of Frauds. Cummings *v.* Arnold, *ubi supra ;* Stearns *v.* Hall, 9 Cush. 31. But in the present case there is no question under the Statute of Frauds. In reference to contracts under seal, it was formerly held, especially in England, that they

could not be thus varied. But in the United States the tendency of judicial decision has been to apply the same rule in this respect to sealed instruments as to simple contracts. In Munroe *v.* Perkins, 9 Pick. 298, the plaintiff, by an instrument under seal, agreed to erect a building at a fixed price, which was not an adequate compensation, and, having done part of the work, refused to proceed ; but upon a parol promise by the defendant that he should be paid for his labor and materials, and should not suffer, he went on and finished the building, and it was held that he was entitled to recover in *assumpsit* upon the parol promise. The Court say : " The parol promise, it is contended, was without consideration. This depends entirely on the question whether the first contract was waived. The plaintiff having refused to perform that contract, as he might do, subjecting himself to such damages as the other parties might show they were entitled to recover, he afterward went on upon the faith of the new promise and finished the work. This was a sufficient consideration." In Mill Dam Foundery *v.* Hovey, 21 Pick. 417, it was held that the time of performance of a sealed agreement to make certain plane-irons within one year might be extended by a new agreement afterward entered into between the parties, not under seal, but upon a sufficient consideration. In Blasdell *v.* Souther, 6 Gray, 149, 151, it was said by Shaw, C.J., in general terms : " We suppose there is no doubt that a valid oral contract may be made upon the basis of a pre-existing contract, either by specialty or by an unsealed written instrument, modifying, changing, and altering the terms of the written agreement." See also Barker *v.* Troy & Rutland Railroad, 27 Vt. 766 ; Lawrence *v.* Davey, 28 Vt. 264 ; Fleming *v.* Gilbert, 3 Johns. 528 ; Langworthy *v.* Smith, 2 Wend. 587 ; Lattimore *v.* Harsen, 14 Johns. 330 ; Stryker *v.* Vanderbilt, 1 Dutch. 482 ; McGrann *v.* North Lebanon Railroad, 29 Penn. St. 82 ; Cooke *v.* Murphy, 70 Ill. 96 ; 1 Smith's Lead. Cas. (8th Am. ed.) 666.

In the present case we are of opinion that it was legally competent for the defendant to prove, as a defence to the plaintiff's action for the rent, that, after the delivery of the lease, the plaintiffs, for a good consideration, entered into an oral agreement that for the future the rent should be reduced, and that the defendant's testimony, and his offer of proof, in respect to the plaintiffs' alleged agreement in the fall of 1877, were sufficient, if believed, to warrant the jury in finding that the plaintiffs were not entitled to recover the amount so agreed to be abated. Agreeing to take in a partner for the ensuing three years, and to borrow the sum of $40,000 and put the same into

the business, provided the rent should be reduced, and actually fulfilling that agreement in consequence of the plaintiffs' promise to reduce the rent, and continuing the business under these circumstances for three years, constituted a change of position on the part of the defendant, which might be of advantage to the plaintiffs, and also of detriment to the defendant, provided the plaintiffs' promise should not be kept. Train *v.* Gold, 5 Pick. 385 ; Hubbard *v.* Coolidge, 1 Met. 84, 92 ; Peck *v.* Requa, 13 Gray, 407 ; Rollins *v.* Marsh, 128 Mass. 116 ; Hinckley *v.* Arey, 27 Maine, 362 ; Moore *v.* Detroit Locomotive Works, 14 Mich. 266.

In respect to the claim of rent for the first year now in controversy, the true construction to be put upon the defendant's testimony, as reported, is a matter of doubt. It is open to the construction that he was merely expressing an opinion or fear that he should not thereafter be able to pay the rent in full, but that he should fail in business at some time in the future, unless a reduction in the rent should be made. Inasmuch as there must be a new trial, when the whole case will be open, we do not now determine the question whether the defendant's testimony in respect to the plaintiff's alleged agreement in the fall of 1876 was sufficient to warrant a finding in the defendant's favor upon that item.

New trial granted.

CHAPTER IX.

NOVATION.

CROWFOOT AND OTHERS, ASSIGNEES OF STREATHER, A BANKRUPT, *v.* W. B. GURNEY.

IN THE COMMON PLEAS, NOVEMBER 21, 1832.

[*Reported in* 9 *Bingham* 372.]

AN arbitrator, to whom this cause was referred, found that Streather, before his bankruptcy, had been employed by the defendant, who was the treasurer of the Baptist College Chapel, to erect the Baptist College Chapel and other buildings. The works were completed in July, 1830; and on December 16th, 1830, there was due to Streather from the defendant, as treasurer of the chapel, a considerable balance for work done and materials supplied by Streather in respect of the buildings aforesaid; but the works were not measured until a subsequent period, and the amount of balance due to the said Streather was not ascertained before April 11th, 1831. On December 16th, 1830, Streather, being indebted to Messrs. Isaac Solly & Sons, gave them the following letter addressed to the defendant: "I shall feel obliged by your paying to Messrs. Isaac Solly & Sons the balance due to me for building the Baptist College Chapel and buildings at Stepney, and their receipt shall be a sufficient discharge to you as treasurer of such chapel." On the same day Solly & Sons sent the above letter to the defendant, enclosed in a letter from themselves, which was as follows: "We beg to hand you annexed an order from Mr. Streather, to pay to us the balance due to him for building the chapel, etc., at Stepney; and we shall feel obliged by your informing us when such balance will be in course of payment. Requesting your due attention to said order, we are, etc." To that letter the defendant, on December 20th, 1830, sent the following answer to Solly & Sons: "I have received your letter enclosing Mr. Streather's, and shall be happy to make the payment to you instead of to him as requested; but I have not yet received

the surveyor's report, and am therefore ignorant of the amount, and the time at which he may direct it to be paid."

Those letters were stamped with an agreement stamp. On April 21st, 1831, a commission of bankrupt was issued against Streather, under which commission the plaintiffs were duly chosen assignees, and the bankrupt's effects were assigned to them previously to the time when the notice hereinafter mentioned was given by the plaintiffs to the defendant. At the time of the bankruptcy, the balance of account due from defendant in respect of the buildings, etc., was £528 4*s*. On May 11th, 1831, the plaintiffs, as assignees under the commission, applied to the defendant for payment of that balance, and gave him notice not to pay the same to Messrs. Solly & Sons. On May 31st, 1831, Solly & Sons claimed from the defendant the payment of the balance, and gave him notice not to pay it to the plaintiffs as such assignees. On August 10th, 1831, the defendant paid the balance to Solly & Sons under an indemnity from them against the claim of the assignees in respect of the balance. The action was brought by the plaintiffs as such assignees to recover the said sum of £528 4*s*.

Upon the above facts the arbitrator was of opinion that the plaintiffs were not entitled to recover. But if the Court should be of opinion that the plaintiffs were in point of law entitled to recover the said sum of £528 4*s*. from the defendant, then the arbitrator awarded and determined that they were so entitled, and ordered and adjudged the defendant to pay the plaintiffs the said sum of £528 4*s*. within a fortnight after the Court should have so determined.

The case having been appointed for argument upon a rule *nisi* obtained for setting aside so much of the award as adjudged that the plaintiffs had no right to recover.

Spankie for the plaintiffs.

TINDAL, C.J. It appears to me that the assignees of Streather are not entitled to recover from the defendant under the circumstances stated on this award. A sum of money was due from the defendant Gurney to Streather; the precise amount is not stated, but it may be collected from the terms employed by Streather, that it was larger than a debt due from Streather to Solly, which Streather desires Gurney to discharge; Gurney gives his assent, an assent which, it may be observed, is wanting in many of the cases referred to. These circumstances amount to an equitable assignment of the debt due from Gurney to Streather, for Solly might have gone into a court of equity to compel a formal assignment, and no answer could have been given to such an application. There was consideration enough

for such an assignment, for Solly, from the time of the order, appears to have abstained from making any application to Streather and to have looked to Gurney alone.

It has been objected that such an assignment could not take place except in respect of a precise and ascertained amount. I cannot concur in that proposition, because all that can be required is, that the debt assigned should not be larger than the sum due to the party assigning. Here the balance was ascertained before Streather's bankruptcy. If it was ascertained while Streather was master of his own acts, it is the same thing as if it had been ascertained at the time of the order. The transaction must be considered, therefore, as an equitable assignment, and then the rule applies that the assignees must stand in the same situation as the bankrupt, and the defendant is entitled to retain his verdict.

GASELEE, J., concurred.

BOSANQUET, J. If Solly had any right in law or equity against Streather upon the order, the assignees cannot recover. I am of opinion that he had a right in equity to claim a formal assignment, and that, therefore, this rule must be discharged.

ALDERSON, J. I am of the same opinion. In Hodgson *v.* Anderson,[1] the order given by Hodgson was, "as soon as you have funds belonging to James Anderson of Trinidad, I will thank you to pay, on my account, to the Commercial Banking Company in your city £291 19*s*., being the amount of my promissory note in favor of E. Robertson, Esq., or any part of the same, advising me of the amount, and I will credit J. Anderson, having received his order to this effect, as he is indebted to me more than this order." This note was delivered to Anderson & Rhind, agents to James Anderson, and they orally promised the banking company to pay to them according to the terms of the order, as soon as they should have funds of the defendant in hand. It appeared that Hodgson afterward gave an order to another creditor, authorizing James Anderson to pay to such creditor the amount of the debt due to him, Hodgson; and James Anderson entered into an obligation to pay the same to such creditor, but there was a clause annexed to the obligation, stating that it had been alleged that a payment had been made by some person to Hodgson, on account of James Anderson, and it was declared that should such payment be proved to have been made, the amount should be deducted. The creditor to whom that order was given demanded payment of the debt from James Anderson, on his arrival in this country, but the latter refused to pay it, on the ground that his agents were

[1] 3 B. & C. 842.

liable to pay it to the Commercial Banking Company, and the same was, in fact, afterward paid to that company. The Court held that although a creditor had a right to insist on payment to himself or to his appointee, yet, having once given an order for the payment of his debt to a third person, he had no right to revoke that order, provided there was a pledge by the person, to whom the authority was given, that he would pay the debt according to the authority. That case is decisive of the present. Gurney promised to pay when the amount should be ascertained ; the amount was ascertained before Streather became bankrupt, and therefore this rule must be discharged.

LYTH *v.* AULT & WOOD.

IN THE EXCHEQUER, MAY 5, 1852.

[*Reported in* 7 *Exchequer Reports* 669.]

THIS was an action of debt brought by the plaintiff, Margaret Lyth, against the defendants, in the Manchester Borough Court of Record, established under the 8 & 9 Vict. ch. 145. The first count of the declaration was for £50 for goods sold and delivered, and the second count was on an account stated.

The defendant Ault pleaded three pleas. The second plea stated, in substance, that the account stated in the second count was stated of the debt in the first count (identifying them) ; and that at the time the debt was incurred by the defendants to the plaintiff, the defendants carried on business as partners together, and the goods were purchased from the plaintiff by the defendants as such partners, to wit, for the purposes of their said business, and not otherwise ; and the debt was incurred by the defendants as such partners as aforesaid, and not otherwise ; and that afterward, to wit, etc., the defendant Ault was about to retire from the partnership, and the partnership business was thereafter intended to be carried on by the defendant Wood alone ; of all which the plaintiff then had notice ; and thereupon, by an agreement then made between the plaintiff and the defendants, it was agreed that the plaintiff should then and there be paid the sum of £12 in part payment of her debt, and in satisfaction and discharge of the sum of £12, part thereof ; and that the plaintiff should relinquish and abandon her claim against the defendant Ault for the residue of the said debt ; and that the defendant Wood should become solely

and separately liable to pay the plaintiff the said residue of her said debt ; and that the plaintiff should and would accept and take the defendant Wood alone as her debtor for the said residue of the said debt, instead of the defendants jointly, and should have no further claim against the defendant Ault in respect of the said residue of the said debt ; and that accordingly thereupon, in pursuance of the said agreement, and in consideration of the premises, the plaintiff was paid by the defendants, and did accept from them the said sum of £12 in part payment of the said debt, and in full satisfaction and discharge of the said sum of £12, part thereof ; and the defendant Wood promised the plaintiff to pay her on request the said residue of the said debt, and to become solely and separately liable therefor ; and the plaintiff then accepted the defendant Wood alone as her debtor for the said residue of the said debt, and did wholly relinquish and abandon her said claim against the defendant Ault for the said residue. Verification.

The plaintiff replied to the second plea by traversing the agreement therein stated.

At the trial, in the borough court, the issues raised by the first and third pleas were found for the plaintiff, but the defendant had a verdict upon the second plea.

Cowling now moved for a rule calling on the defendant to show cause why judgment should not be entered for the plaintiff upon the second issue *non obstante veredicto.*

POLLOCK, C.B. We are all of opinion that there ought to be no rule. The reasons of our decision have already been given during the course of the argument. It is not perhaps very easy to distinguish the present case from that of Lodge *v.* Dicas. It may, however, be observed that there the matter relied upon as the consideration for the exoneration of one of the partners was the term that the other partner should collect the debts due to the partnership and should pay the plaintiffs' claim ; and the Court held that there was no evidence that the plaintiffs knew of this arrangement between the defendants. The plea here in substance states, that the defendant Ault was about to retire from the partnership, and that the other defendant was to remain in it ; and that the plaintiff knew these circumstances, and agreed with the defendants to take a certain sum from the defendant Ault, and to release him from all further responsibility, and to look solely to the continuing partner for the payment of the residue of the debt. It is perfectly clear that the parties had a right to substitute a liability which was altogether different from that upon which the original debt was founded. The Court never does, and indeed cannot, inquire into the ade-

quacy of the consideration of any agreement into which parties may please to enter. But it appears from the pleadings that some consideration exists. It appears to me that this case might, if it were necessary, be distinguished from Lodge *v.* Dicas ; but it is sufficient to say that it does not support Cowling's argument. The sole responsibility of one of two joint debtors may be more advantageous than their joint responsibility, and certainly they are two very different things. I therefore am of opinion that the plea is good.

PARKE, B. I am of the same opinion. The principle which governs this case is to be found expounded in Thompson *v.* Percival. It is clear that where there is an accord and satisfaction, by the debtor agreeing to give something totally different in its nature from the debt, and which the creditor agrees to accept in satisfaction of the debt, the Court cannot inquire into the value of that which is the subject-matter of the new agreement ; and therefore there is nothing to prevent the parties from agreeing that a horse, or bill of exchange, or any other commodity, shall be given in satisfaction of a larger demand. There is a very strong case to be found in Dyer, of Andrew *v.* Boughey, Dyer, 75*a*, where, to a declaration for delivering 373 pounds of bad wax upon an *assumpsit* for 400 pounds of good wax, stating half the price to have been paid in hand, the rest to be paid upon a day agreed, a plea of 20 pounds of wax given and accepted in satisfaction was held good. The Court proceeded upon the ground that they were not at liberty to go into the value of the consideration of the new agreement, provided the thing differed from the debt itself. The law leaves the parties to their bargain. Now it cannot be doubted that the sole security of one of two joint debtors may be more beneficial than the joint responsibility of both. In the latter case you are not entitled to sue one with safety, for the defendant may plead in abatement the non-joinder of his co-contractor. In case of the bankruptcy of one of the partners, there would also be a difference. In the case put by my Lord Chief Baron, of two debtors, where one is a rich old man and the other is young and without property, it might be much more advantageous to the creditor to have his sole remedy against the former, for he would have the security of the personal and real estate of the rich debtor, which he would not have at law in case the old man were to die first. Where there is more than one debtor, the creditor's remedy is different. There is, therefore, no doubt that the thing substituted is altogether different from the original debt. In Thompson *v.* Percival it is said by the Court of King's Bench, that, in the case of Lodge *v.* Dicas, the

difference between the joint liability of two and the separate liability of one does not appear to have been brought under the consideration of the Court. The case of Lodge *v.* Dicas rested upon a totally different ground from the present, for there the consideration for the discharge of the one defendant (Dicas) was the allowing the other partner to collect the partnership debts ; and the Court held that, as there was no evidence that that fact was known to the plaintiffs, there was no consideration whatever for the plaintiffs' promise ; but the point which now arises was not taken by the counsel or acted upon by the Court. This point, however, was much considered in Thompson *v.* Percival, and the decision there was wholly irrespective of the fact that a bill had been given. As I am, therefore, clearly of opinion that the sole responsibility of one of several joint debtors is different from their joint responsibility, the plea discloses a sufficient consideration for the plaintiff's promise to exonerate this defendant from the residue of the debt, and affords a good answer to the action.

ALDERSON, B. I am of the same opinion. It is demonstrable that the sole security of A. may be a better thing than the joint security of A. and B.; for, by accepting the sole security of A. instead of the joint security of both debtors, the creditor possesses a legal remedy against A. during his lifetime, and against his assets after his death, and no security whatever against B. Now, as to the case where the security is joint. After the death of A. there exists a legal liability of B., and no legal liability of A.'s assets ; but an equitable remedy against the assets of A., subject to the necessity of making B. a party to a suit in equity. Now these two securities are different things, and therefore a bargain to take the one for the other is good. Cases may be suggested of A. being rich and B. poor, in which the advantage of taking A. as the debtor in lieu of A. and B. is clear ; or it may be that A. is as rich as B., in which case the creditor may fairly consider that one debtor alone is preferable to both together. If, instead of B., the names of a hundred persons be substituted, these persons must all be made parties to a suit in equity. Wilkinson *v.* Henderson, 1 My. & K. 582 ; Thorpe *v.* Jackson, 2 Y. & C. 553, where Lord Eldon's opinion in *ex parte* Kendall is quoted. Now, in a suit in equity where a hundred parties are in the suit, the chances of its lasting many years and of its costing much are infinite.

MARTIN, B., concurred.

Rule refused.

COCHRANE *v.* GREEN.

In the Common Pleas, November 26, 1860.

[*Reported in* 9 *Common Bench, New Series*, 448.]

The first count of the declaration stated that theretofore, to wit, on March 5th, 1858, the plaintiff had certain valid and *bonâ fide* claims and demands against the defendant, and had, in order to enforce payment and satisfaction thereof, instituted a suit in the High Court of Chancery against the defendant; and thereupon, to wit, on the day and year aforesaid, in consideration that the plaintiff would at the defendant's request forbear to prosecute the said suit, and abandon the same and his aforesaid claims and demands, the defendant promised the plaintiff that he, the defendant, would out of the first moneys he might receive from Mr. Watson, of Parliament Street, in respect of his, the defendant's, claim upon him, the said Mr. Watson, arising out of the Bahia railway contract, hand to the plaintiff the sum of £500, and out of any further moneys he might receive from the said Mr. Watson in respect of the same contract 10 per cent upon the net amount which he might so from time to time receive, until such percentage to the plaintiff should amount to the sum of £1300, when all further payments by the defendant were to cease; it being understood and agreed between the plaintiff and the defendant that the defendant would not compromise with the said Mr. Watson without providing for the plaintiff the above-mentioned £1300, or so much of it as might remain due to him according to his promise. Averment, that the plaintiff did accordingly forbear to prosecute the said suit, and did abandon the same and his aforesaid claims and demands; and that all conditions precedent, matters, and things requiring to have been performed and to have happened and existed to entitle the plaintiff to the full performance of the said contract by the defendant, and to maintain his action for the non-performance thereof as thereinafter mentioned, were performed and did happen and exist before the commencement of this suit; yet the defendant to keep his said promise wholly failed, and had not at any time paid the said sum of £500 or any part thereof, or the said sum of £10 per cent, or any part thereof.

There was a second count for money payable by the defendant to the plaintiff for work done by the plaintiff for the defendant at his request, and for money received by the defendant to the

use of the plaintiff, and for money found to be due from the defendant to the plaintiff upon accounts stated between them.

Seventh plea, as to so much of the first count of the declaration as related to the sum of £339, parcel of the said sum of £500 therein mentioned, and also as to the plaintiff's claim in respect of the causes of action in the last count of the declaration mentioned, that before the commencement of the suit the plaintiff was indebted to one Samuel Smith in the sum of £339, and the defendant, before the commencement of the suit, at the request of the plaintiff, agreed with the said Samuel Smith to pay him, the said Samuel Smith, the said sum of £339, and the said Samuel Smith agreed to accept the defendant as his debtor instead of the plaintiff for the said sum of £339, and the defendant was still liable to pay the same to the said Samuel Smith, whereby the plaintiff's right to recover the said sum of £339 was and is wholly lost and extinguished.

Demurrer, on the ground "that the seventh plea sets up a mere collateral independent agreement not in any way connected with or relating to the causes of action to which the seventh plea is pleaded."[1]

J. Brown (*Hawkins*, *Q.C.*, with him) in support of the demurrers.

Lush, *Q.C.* (*Giffard* with him), *contra*.

ERLE, C.J. As to the seventh and eighth pleas, which are pleaded by way of accord and satisfaction, I am of opinion that they are bad pleas. It is well known in law that, if three persons stand in the relation in which the plaintiff, the defendant, and Smith are stated to stand in the seventh plea, and the three agree that the plaintiff shall be discharged of the debt due from him to Smith, and that the defendant's liability to the plaintiff shall be transferred to Smith, the agreement may be pleaded as a discharge by the defendant of the debt due from him to the plaintiff. But short of that I am not aware that there would be any valid defence. I see nothing on the face of the plea to estop Smith from suing the plaintiff. He does not discharge the plaintiff merely because he gets by way of collateral security the defendant's promise that he will pay him the debt due from him to the plaintiff. These two pleas, therefore, in my judgment fall far short of the known requirements of a plea of accord and satisfaction, and consequently upon the demurrers to them the plaintiff is entitled to our judgment.

WILLIAMS, J. I am of the same opinion. As to the seventh and eighth pleas, they seem to me to amount to this: I, the defendant, am discharged, because I took upon myself the

[1] Only so much of the case is given as relates to the seventh plea.—ED.

debts due from you, the plaintiff, to Smith and to Moore. The pleas, however, do not allege that the defendant relieved the plaintiff from all responsibility in respect of the debts to those two persons, no agreement as between the plaintiff and Smith or the plaintiff and Moore that he, the plaintiff, should in consideration of the defendant's taking the debts upon himself be relieved therefrom. The pleas, therefore, present no defence, and our judgment must be for the plaintiff.

BYLES and KEATING, JJ., concurred.

SARAH SCOTT, ADMINISTRATRIX, ETC., *v.* D. D. ATCHISON AND OTHERS.

IN THE SUPREME COURT OF TEXAS, TERM OF 1871–72.

[*Reported in* 36 *Texas* 76.]

APPEAL from Grimes. Tried below before the Hon. J. R. Burnett.

Originally this was a suit brought by D. B. Morrell as plaintiff, against the appellee, Atchison and others, as defendants. The appellant intervened, and the matters brought to this Court spring from her intervention, and are stated in the opinion. It does not appear that any coercion or pressure was employed by Atchison to influence Mrs. Scott's acceptance of his note and deed of trust in lieu of Pye's; on the contrary, the evidence repelled such a supposition.

Baker & Maxcy and *John C. Easton* for the appellant.

C. Caldwell and *D. D. Atchison* for the appellees.

WALKER, J. On page 3 of appellees' brief, we find such a statement of this case as we believe the appellant cannot object to, and, as we think the single point necessary for our consideration is herein presented, we adopt the statement from which we will endeavor to deduce our opinion.

It is as follows:

"The whole subject-matter now presented in this case is simply this point: In May, 1862, A.D., Confederate money was the currency in circulation. Atchison purchased the tract of land in controversy from James B. Pye, for about $6000, and paid therefor this money, reserving a balance in his hands with which to take up and discharge a note of Pye to Noble, and a note from Pye to Mrs. Sarah Scott, the payment of each of which was secured by a lien on the land. William Niblett, Esq.,

the son-in-law and attorney at law, whose name is signed to intervenor Scott's petition, agreed to discharge the Pye note, in consideration of Atchison's note, executed to Mrs. Scott, payable two years after a treaty of peace between the Confederate States and the United States, the payment to be secured by deed of trust. And it was accordingly done ; and in this way Pye's note was taken up, paid, and discharged, and the trustee released the title vested in him to Atchison."

We must add to this statement of the case that the appellant, Mrs. Scott, is the administratrix of her husband's estate, and that the money sued for belongs to the estate.

The question then arises, is the obligation of Pye, and the lien which he gave upon the land in question discharged ? It is not disputed but that Pye was indebted to Mrs. Scott on March 15th, 1861, in the sum of $2475. This was a valid debt, secured upon the land, on March 20th, 1862, when Pye sold the land to Atchison, and, as a part of the consideration, Atchison assumed to pay the same, under the following clause in his deed from Pye : "And for further consideration the said Daniel D. Atchison does hereby assume the payment of a certain promissory note, for the sum of $2475 with interest thereon at the rate of 12 per centum, from February 9th, 1861, A.D., due February 9th, 1862, and executed by James B. Pye, on March 15th, 1861, to Sarah Scott of Grimes County, and secured by deed of trust on the tract of land herein conveyed to said Atchison," etc.

At page 217, 1 Parsons on Contracts, the author informs us that the term novation is derived from the civil law, where it forms an important topic. The term delegation also belongs to the civil law, and herein we find the true definition of the transaction between these parties.

In Pothier on Contracts, vol. i., top page 444, we find this language : "*Delegare est vice sua alium reum dare creditori, vel cui jusserit.* Delegation is a kind of novation by which the original debtor, in order to be liberated from his creditor, gives him a third person who becomes obliged in his stead to the creditor, or to the person appointed by him. It results from this definition, that a delegation is made by the concurrence of three parties, and that there may be a fourth. There must be a concurrence, first, of the party delegating—that is, the ancient debtor, who procures another debtor in his stead ; second, of the party delegated, who enters into an obligation in the stead of the ancient debtor, either to the creditor or some other person appointed by him ; third, of the creditor who, in consequence contracted by the party delegated, discharges the party

delegating. Sometimes there intervenes a fourth party—viz., the person indicated by the creditor, and in whose favor the person delegated becomes obliged, upon the indication of the creditor, and by the order of the person delegating.

"To produce a delegation, the intention of the creditor to discharge the first debtor, and to accept the second in his stead, must be perfectly evident; therefore, if Peter, one of the heirs of my debtor, in order to liberate himself from an annuity to me, has, upon a partition of the succession, charged his co-heir James with the payment of it, Peter will not be liberated unless I formally declare my intention that he shall be so; and though I receive the annual payments from James for a considerable time, it must not be concluded that I have taken him as my sole debtor in the place of Peter, and discharged Peter."

There must be no illegality or fraud; the transaction must be free from covin and misrepresentation, and duress *per minas;* for, says Pothier, pages 554, 557: "There must be no obligations which the law reprobates and annuls, for these cannot produce any effect. *Vide supra*, page 92, ch. 2."

The consent which the creditor gives to the novation of the debt being equivalent, so far as regards the extinction of the debt to a payment of it, it follows that only those to whom a valid payment may be made can make a novation of the debt. And for this reason those persons who were under legal inability, minors, married women, etc., cannot make a novation; and apply to this the principle of the common law, that guardians, trustees, administrators, and executors cannot change the character of the trust funds held by them, without an order from a court of chancery jurisdiction, they, too, it would seem, should not be allowed to make a novation of an old debt for a new one. Nor will courts apply the doctrine of presumption, to make out a novation or delegation which does not clearly appear; and, says Pothier, the reason of this law is, that a person shall not easily be presumed to abandon the rights which belong to him. And as a novation implies an abandonment by the creditor of the first claim to which the second is substituted, it is not to be easily presumed, and the parties ought expressly to state it. We will not deny but that the acts of parties might be such that the courts would hold that the novation had been consummated. But, says Pothier: "Unless the intention evidently appears, a novation is not to be presumed; therefore, if I attach the goods of Peter in the hands of James, and James merely undertakes to pay the money due from me to Peter, without any expression on my part of taking the security for the sake of Peter, or some other intimation that renders it evi-

dent that I intend that Peter shall be discharged, it will not be considered as a novation ; but James will only be deemed to have acceded to the obligation of Peter, who continues bound as my debtor. This was adjudged by an *arret* (act) of the Parliament of Toulouse reported by Catelan, vol. ii., page 5, ch. 38."

"Upon this principle," says Mr. Evans, the English editor of Pothier, "it was held by the Court of King's Bench in White *v.* Cuylor, 6 T. R. 176, that the undertaking of a surety by deed did not extinguish the obligation of the principal debtor. And in the case of Hamilton *v.* Cullenden, 1 Dallas, 420, it appeared that Cullenden gave the plaintiff a mortgage and bond ; that Cullenden's executors afterward sold the equity of redemption to Bind, who gave his bond to the plaintiff for the amount of the principal and interest then due, which was ruled to be no discharge of the preceding bond. The discussion, as is usual in the American courts, turned principally upon the authorities of the English law." This last remark of the editor may be very satisfying to English legal pride, but if this were ever true, we incline to think that the rule has changed.

Let us, so far as these principles are applicable, apply them to this case. There was doubtless a concurrence between Pye and Atchison, the delegant and the delegate ; but was there any contemporaneous concurrence of Mrs. Scott, the creditor, in the arrangement? Has there ever been such a concurrence ? Apply the maxim "*consensu animo.*"

This kind of contract, like all others, to be binding, must be consensual. It was not until June 19th, 1862, that Atchison entered into the arrangement with Niblett, the appellant's attorney, under which he claims to have extinguished Pye's debt to Mrs. Scott. And how was this accomplished, if at all ?

This Court has decided at the present term that an attorney has no power to change the securities of his client, unless he be the attorney in fact, specially authorized so to do, under a power. And that payments made to attorneys, administrators, executors, and guardians, in Confederate money, do not extinguish the debt, we have more than once decided. If, then, the payment had been made in Confederate money to Niblett, it would not have extinguished the debt ; no more would it when made to Mrs. Scott herself, if the debt were a part of the assets of her husband's estate.

But let us look at the nature of Atchison's undertaking. It seems to have been an agreement to pay $2879.25, "twenty-four months after the ratification of a treaty of peace between the United States and Confederate States, payable in whatever may

then be the legal tender currency of the Confederate States, with 8 per cent interest from date." It appears to be conceded that this contract is void from uncertainty. We are by no means sure that we should adopt this opinion, were it necessary to give it such equitable construction as the rights of parties in a given case might demand ; and we say that this obligation was not discharged by payment in Confederate money to Mrs. Scott as administratrix of her husband's estate.

There has been a "treaty of peace," and the Confederate States and all the other States of the United States of America have a legal tender currency ; and we think it by no means a foregone conclusion that the contract is void for uncertainty ; but it is perhaps unnecessary to discuss the question farther.

Mr. Parsons, in elucidating the subject of novation, vol. i., page 219, says : "And the general principles in relation to consideration attach to the whole transaction. Thus, to give to the transaction its full legal efficacy, the original liabilities must be extinguished. For if the debt from A. to B. be not discharged by A.'s promise to pay it to C., then there is no consideration for this promise, and no action can be maintained upon it ; but if this liability be discharged, then it is a sufficient consideration."

Was Pye's liability, then, to Mrs. Scott, which was valid and binding—in other words, a legal contract, based upon a good consideration—discharged by Atchison's promise, which we are at one time told is void for uncertainty ? And again we are told that the real sum and substance of this promise was to pay the debt in Confederate money, which was accordingly done. Can a binding legal contract be discharged in this way, by the promise to do, or the actual performance of an illegal transaction ? We think not ; but if we had any doubt as to the correctness of our opinions, that doubt would be set at rest by the former decisions of this Court. In the case of Kleberg *v.* Bonds, 31 Texas, 612, Caldwell, J., delivering the opinion of the Court, says : "It has been repeatedly ruled by this Court, that Confederate money, so called, cannot be considered a payment. True, it has in like manner been held that an executed contract will not be disturbed when Confederate money was the consideration." Ransom *v.* Alexander, 31 Texas, 443.

"In the case of an administrator receiving a debt due his intestate's estate, in Confederate money, and surrendering the evidence of debt, it cannot be viewed in the light of an executed contract. The debt still remains due, and may be collected by process of law, because the debtor is bound to know that an absolute payment in lawful money can only discharge a debt

sounding in dollars, payable to any one acting in a fiduciary capacity." We adopt the doctrine of this case, and that of all other similar cases heretofore adjudicated by this Court and the courts of other States. And the doctrine is maintained in all the insurgent States, except alone the State of North Carolina. The learned judge says, in the opinion just quoted, all that we need say on this branch of our case, and must not gainsay, as an attorney, what he has said as a judge. We are not opening up an executed contract where Confederate money has passed, but we propose to enforce a good contract which has not been executed—a contract in no respect illegal was that of Pye with Mrs. Scott, and no illegal contract must come in the way of its execution.

What, then, is the present status of the parties? We hold that Pye's obligation to Mrs. Scott has never been discharged, and that it is a valid incumbrance upon the land that Atchison bound himself to Pye to pay off; that the debt is still an encumbrance upon the land; and that subsequent purchasers of the land, with notice, cannot take it discharged of the encumbrance, and Pye's deed to Atchison is notice to all who claim under or through it.

The pleadings are defective, and will require amendment. We might, under the authority of Harwood *v.* Blythe, 32 Texas, 800, proceed to render a judgment in accordance with this opinion; but we deem it better to reverse and remand the case, that parties may have an opportunity of amending their pleadings and presenting the cause to the District Court in accordance with the law herein laid down; which is accordingly done.

Reversed and remanded.

SPYCHER, RESPONDENT, *v.* WERNER, IMP., APPELLANT.

IN THE SUPREME COURT OF WISCONSIN, SEPTEMBER 24, 1889.

[*Reported in* 74 *Wisconsin* 456.]

APPEAL from the Superior Court of Milwaukee County.

The case is sufficiently stated in the opinion. The defendant, Dora F. Werner, appeals from a judgment in favor of the plaintiff.

For the appellant there was a brief by F. P. Hopkins, her guardian *ad litem*, and H. A. Wambold, of counsel, and oral argument by Wambold.

Nathaniel Pereles & Sons for the respondent, and oral argument by *J. M. Pereles*.

ORTON, J. This action was brought to foreclose a mortgage given by the defendant, Frederick H. Werner, to the plaintiff, to secure a note for $700, and interest, given at the same time by said mortgagor to said mortgagee. The said Frederick H. Werner made default; but the said appellant, Dora F. Werner, an infant under the age of twenty-one years, appeared by guardian *ad litem*, and answered substantially as follows: "That the defendant, Frederick, was indebted to her in the sum of $1000, and that in consideration thereof he conveyed the mortgaged premises to her, after said note and mortgage were given, and that the plaintiff agreed "to take and hold this defendant (Dora) as his debtor for the $700 to secure the payment of which the said note and mortgage were given," and discharge the defendant, Frederick, from said indebtedness. These facts the appellant offered to prove, but such offer was rejected by the Court.

It is contended by the learned counsel of the appellant that these facts constituted a novation, by which the indebtedness of said mortgagor, Frederick, was discharged, and if the indebtedness was discharged, the mortgage security thereof was also discharged; and that the defendant, Dora, could not be held for said indebtedness, because she was, and is yet, an infant. This may be a very plausible theory by which, at one stroke of this deadly agreement, the plaintiff has lost his claim and all of the defendants are discharged; but it is as futile, gauzy, and transparent as it is inequitable and unjust. If the plaintiff ever accepted this infant, Dora, as his only debtor, and discharged Frederick, he was very simple and easily satisfied; and if he knew or intended that he would thereby release and discharge his mortgage, he must have been mentally incompetent to do business for himself. After Dora took the conveyance of the mortgaged property in payment of the $1000 as the whole consideration of the deed, according to the answer, the transaction between her and Frederick was closed, and there was no indebtedness between them one way or the other. There is no averment in the answer that Dora was to pay or assume the $700 to the plaintiff as any part of the consideration of the conveyance, and the deed was not made subject to the mortgage, and Dora did not therein assume to pay the debt secured by the mortgage as a part of the consideration or otherwise. The answer sets up no agreement on the part of Dora to buy the land of Frederick for $1700, but only for $1000, which Frederick owed her. There was, therefore, no indebtedness by her over to Frederick, and no consideration for her promise to pay the $700 to the plaintiff. Her indebtedness to Frederick was essen-

tial to the novation. But perhaps it may be claimed that the answer, by a liberal construction, does aver that the $700 and interest was assumed by Dora as a part of the consideration for the deed ; but I am unable to find such an averment. Yet the novation fails for want of the essential requisite that there must have been a valid claim against Dora, and she must have been bound to pay the debt. The answer carefully avers that the plaintiff knew or was informed that the appellant, Dora, was under twenty-one years of age at the time she so promised, and she now alleges that she was not bound. If not, then the defendant, Frederick, was not discharged. "There must be the substitution of a new obligation for the old one, and the new contract must be a valid one upon which the creditor can have his remedy." Lynch *v.* Austin, 51 Wis. 287 ; Guichard *v.* Brande, 57 Wis. 536 ; Hosack *v.* Rogers, 8 Paige, 238 ; Clark *v.* Billings, 59 Ind. 509 ; Bronson *v.* Fitzhugh, 1 Hill, 186.

It is not claimed that there was any agreement that the mortgage security should be affected in any way, but that it is discharged because the debt was transferred from Frederick to Dora Werner. The debt itself was not paid or discharged. In this case it would be preposterous to claim that the plaintiff ever intended to accept the irresponsibility and voidable promise of the infant, Dora, in the discharge of all the security as well as the liability there was for the payment of the debt. We cannot put any such construction upon this pretended agreement or give it any such effect. It would be most unreasonable as well as unjust to do so, and stultify the plaintiff. The Court very properly denied the offer of such evidence to defeat the mortgage.

By the Court. The judgment of the Superior Court is affirmed.

KELSO *v.* FLEMING.

IN THE SUPREME COURT OF INDIANA, NOVEMBER TERM, 1885.

[*Reported in* 104 *Indiana* 180.]

FROM the Dubois Circuit Court.

W. A. Traylor and *W. S. Hunter* for appellant.

E. A. Ely, *W. F. Townsend*, and *Bretz* for appellee.

MITCHELL, J. This suit was brought to recover on a promissory note, dated June 3d, 1881, due in twelve months. The note was signed by A. T. Fleming, payable to Lemuel L. Kelso,

and called for $492. It was assigned by written endorsement, dated August 22d, 1882, to Clara A. Thomas, who, it is alleged, has since intermarried with Zenas C. Kelso.

The only answer upon which any question arises presents the following facts: It avers that the day after the note was executed the defendant executed a mortgage conveying to the payee certain real estate as security for the debt. That subsequently, on May 2d, 1883, the defendant sold and conveyed the land mortgaged to one Steen, who assumed the payment of the mortgage debt as part of the purchase-price. That the payee of the note agreed to accept Steen as the payor of the debt and release the defendant, and that, in pursuance of the agreement so made, he did release the defendant. It was averred further, that at the time this agreement was made the defendant had no notice of the assignment of the note.

A demurrer was overruled to the answer, and upon evidence tending to sustain it, there was a finding and judgment for the defendant.

The ruling on the demurrer and the finding on the evidence are brought in question by the errors assigned.

The question discussed relates to the sufficiency of the facts pleaded in the answer and proved by the evidence to constitute a novation of the debt. That the assumption of the debt by Steen made him, as between himself and Fleming, primarily liable, is beyond question. Birke *v.* Abbott, 103 Ind. 1, and cases cited. It does not follow, however, that the original debtor was thereby released, or that the right of the holder of the note to proceed against him was in any manner affected. Davis *v.* Hardy, 76 Ind. 272; Josselyn *v.* Edwards, 57 Ind. 212.

Nor do we think that the averments that the payee agreed to accept the purchaser and release the maker of the note show any consideration upon which to claim a release or novation.

One of the essential elements to a novation is, that there should have been an extinguishment of the old debt; and another is, that there should have been a mutual agreement between all the parties, that the old debt should become the obligation of a new debtor.

The sale of the land and the assumption of the mortgage debt, so far as the answer discloses, was a separate, independent transaction between Fleming and Steen. The agreement between Kelso and Fleming, that the former would accept Steen as payor and release the defendant, was equally independent of the sale of the land and the assumption of the debt by the purchaser.

Upon the conveyance of the land to Steen and the assumption

of the debt by him, Kelso's right to proceed against him was complete, and his subsequent agreement to release Fleming was without consideration to support it.

There was no agreement mutually entered into between all the parties, that Steen should become the debtor of Kelso, and that in consideration of his so agreeing Fleming's debt should be released. As between Fleming and Kelso, the debt remained the debt of the former; that Steen had assumed its payment by contract with Fleming, no consideration or benefit to Kelso appearing, did not extinguish the debt. The arrangement between Fleming and Steen, completed in the absence of Kelso, and subsequently assented to by him, did not constitute a consideration to uphold his agreement to release.

Novation means simply the substitution of one debtor by mutual agreement for another. It is a necessary incident of the transaction, that the old debt shall have been discharged by the new arrangement. The discharge of the old debt must be contemporaneous with, and result from the consummation of, the arrangement with the new debtor.

The most that can be made of the facts in this case is, that by the assumption of the debt by Steen, resulting from his agreement with his vendor, he came under an equitable obligation to Kelso without any agreement whatever with the latter. The agreement of assumption enured at once to his benefit. The subsequent agreement between Fleming and Kelso, to which Steen was a stranger, did not in any manner change the relation between Kelso and Steen. Their respective rights and obligations remained precisely the same. There is, therefore, an absence of two of the essential elements to constitute a novation: 1. A mutual agreement between all the parties to substitute a new debtor for the old debtor. 2. The extinguishment of the old debt. Fensler *v.* Prather, 43 Ind. 119; Clark *v.* Billings, 59 Ind. 508; Bristol, etc., Co. *v.* Probasco, 64 Ind. 406; Parsons *v.* Tillman, 95 Ind. 452.

The averment that the payee of the note did release the defendant is the statement of a mere conclusion of law.

What has been said concerning the answer necessarily disposes of the motion for a new trial.

The judgment is reversed with costs.

NIBLACK, C.J., did not participate in this decision.

Filed December 11th, 1885.

ROE *v.* HAUGH.

IN THE EXCHEQUER CHAMBER, TRINITY TERM, 1697.

[*Reported in* 12 *Modern Reports* 133.]

B. was indebted to A. in the sum of £42, and C. in consideration *quod* A. *accipere vellet ipsum* C. *fore debitorem ipsius* A. *pro quadraginta duob. lib. eidem* A. *per* B. *tunc debit in vice et loco ejusdem* B. *super se assumpsit, et eidem* A. *promisit quod ipse* C. *easdem quadraginta duas lib. eidem* A. *solvere vellet.* A. dies; his executors, on this promise, bring an *assumpsit* against C. averring in their count, that A., the testator, trusting to the said promise of C. *accepit præd.* C. *fore debitorem ipsius* A. without saying anything that he discharged B. *Non assumpsit* pleaded; verdict and judgment for the plaintiff. Writ of error brought in the Exchequer Chamber.

The error insisted on was that this is a void *assumpsit*, here being no good consideration, for except B. was discharged, C. could not be chargeable.

For which reason Blencowe, Powell, and Ward were of opinion judgment should be reversed, but Powis, Nevill, Lechmere, and Treby that this being after verdict, they should do what they could to help it; to which end they would not consider it only as a promise on the part of C., for as such it would not bind him except B. was discharged; but they would construe it to be a mutual promise—viz., that C. promised to A. to pay the debt of B. and A. on the other side promised to discharge B., so that though B. be not actually discharged, yet if A. sues him, he subjects himself to an action for the breach of his promise.

The judgment was affirmed.

WHARTON *v.* WALKER.

IN THE KING'S BENCH, EASTER TERM, 1825.

[*Reported in* 4 *Barnewall & Cresswell* 163.]

ASSUMPSIT for money had and received, and on an account stated. Plea, *non assumpsit.* At the trial before the recorder of Chester, at the last summer assizes for that city, it appeared that one Lythgoe was indebted to the plaintiff in the sum of £4 5*s.*, and gave the plaintiff an order upon the defendant, who

was his tenant, to pay that sum out of the next rent that became due. The plaintiff transmitted the order to the defendant, but had not any direct communication with him upon the subject. When the next rent became due and was demanded by Lythgoe, the defendant produced the order, the amount of which he promised to pay to the plaintiff, and paid Lythgoe the difference between that and the sum due for rent, and thereupon Lythgoe gave him a receipt for the whole sum. Upon this evidence the learned judge nonsuited the plaintiff, but gave the plaintiff leave to move to enter a verdict for the sum claimed. A rule was accordingly obtained in Michaelmas Term, against which

J. Williams now showed cause.

Cottingham, contra.

BAYLEY, J. The case of Wilson *v.* Coupland is very distinguishable from the present. There the defendants were originally indebted to Taillasson & Co. for money had and received, and Taillasson & Co. were indebted to the plaintiffs, and with the consent of all parties it was arranged that the plaintiffs should take the defendants as their debtors. By that arrangement the demand against Taillasson & Co. was extinguished, and the defendants having been indebted to them for money had and received, it was held that the plaintiffs might recover in that form of action. In the present case no money was ever had and received by the defendant to the use of any person, which objection existed in Israel *v.* Douglas, and has caused the propriety of that decision to be since doubted. But there is another objection in the present case. If by an agreement between the three parties, the plaintiff had undertaken to look to the defendant and not to his original debtor, that would have been binding, and the plaintiff might have maintained an action on the agreement, but in order to give him that right of action there must be an extinguishment of the intermediate debt. No such bargain was made between the parties in this case. Upon the defendant's refusing to pay the plaintiff, the latter might still sue Lythgoe, and this brings the case within Cuxon *v.* Chadley.[1] Upon these two grounds, that the debt from Lythgoe to the plaintiff was not extinguished, and that the defendant has not received money to the use of the plaintiff, I am of opinion, that the count for money had and received cannot be supported ; and the first objection applies equally to the count upon an account stated. The rule for setting aside the nonsuit must, therefore, be discharged.

HOLROYD, J. I am of the same opinion. In Tatlock *v.* Harris,[2] Buller, J., puts this case . "Suppose A. owes B. £100,

[1] 3 B. & C. 591. [2] 3 T. R. 180.

and B. owes C. £100, and the three meet, and it is agreed between them that A. shall pay C. the £100, B.'s debt is extinguished, and C. may recover that sum against A." In Wilson *v.* Coupland the demand was originally for money had and received, and the intermediate debt was extinguished. This case differs in both those particulars, and Cuxon *v.* Chadley is an authority against the plaintiff.

LITTLEDALE, J. I am of opinion that the nonsuit was right. Upon the facts proved at the trial this cannot be considered as money had and received to the use of the defendant. As to the account stated, it cannot be said that this was an account stated of money due and owing to the plaintiff, for it was due and owing to Lythgoe. Again, the original debt due from Lythgoe was not extinguished. In the supposed case put by Buller, J., in Tatlock *v.* Harris the extinguishment of the original debt was an ingredient ; and in Com. Dig. tit. Action upon the Case upon Assumpsit (B. 3), it is said that " the discharge of a debt is a good consideration for a promise ;" and in Wilson *v.* Coupland that consideration existed. In the present case, even if the parties had met and agreed, and the debt from Lythgoe had been discharged, still no money having been received by the defendant to the plaintiff's use, the latter must have declared specially on the agreement, and could not have recovered in this form of action.

Rule discharged.

FAIRLIE *v.* DENTON & BARKER.

IN THE KING'S BENCH, JUNE 17, 1828.

[*Reported in* 8 *Barnewall & Cresswell* 395.]

ASSUMPSIT for money had and received. Plea, *non assumpsit.* At the trial before Lord Tenterden, C.J., at the London sittings after Hilary Term, 1828, the following appeared to be the facts of the case. By articles of agreement the defendants and one E. Perry agreed to grant a piece of land therein described. unto S. Crossland & J. Stonehouse, who agreed to build on the same land twelve brick messuages or dwelling-houses. The defendants and Perry agreed to purchase from Crossland & Stonehouse a yearly rent-charge of £96 to be charged upon the said messuages, at and for the sum of £1200, which said sum of £1200 was to be paid to Crossland & Stonehouse, or to their order in writing, by six instalments, at specified stages in the

progress of the buildings. The fifth instalment was £180, and was to be paid as soon as the plasterers' work should be finished. The sixth and last instalment was £240, and was to become due when each of the twelve messuages should be painted, papered, and colored, iron rails and iron work fixed, and in all respects completely fit for the reception of a tenant.

The defendants from time to time made payments on account of the £1200 to Crossland & Stonehouse, and the latter at different times gave to the plaintiff eight orders in writing on the defendants, for several sums of money, amounting in the aggregate to £499 10*s*. The defendants paid the sums mentioned in the first five orders only. Crossland being called as a witness stated that he kept a book in which he entered all moneys received by him of the defendants, and he entered as cash payments made by them the amount of the several orders given by him and Stonehouse in favor of the plaintiff; and he further stated that the defendants kept a book, in which there were entries corresponding in all respects with his own, the two accounts having been frequently checked and compared with each other. The defendants' book having been produced, it appeared that they had charged Crossland & Stonehouse, on account of the orders given to the plaintiff, with such sums only as they had actually paid the plaintiff. Crossland further stated that after all these orders had been given, and the first five had been paid, he on February 5th applied to the defendants for a further advance. At that time the defendants had advanced to Crossland & Stonehouse including the sums paid in pursuance of their orders to the plaintiff, £872, and the plaintiff had lodged in the defendants' hands orders of Crossland & Stonehouse to the amount of £233. They refused to advance Crossland & Stonehouse any further sum, alleging as a reason for their refusal, that there was upward of £200 due to the plaintiff on the orders lodged with them, for which they, the defendants, were responsible. The plaintiff gave no evidence to show that at the time when this conversation took place the buildings were in such a state of forwardness as to entitle Crossland & Stonehouse to a larger sum than that which had already been advanced to them by the defendants; and it afterward appeared, in the course of the defendants' evidence, that the buildings were not only not completed on February 5th, but it was at least doubtful whether the plasterers' work had been done so as to entitle Crossland & Stonehouse to the fifth instalment. The defendants afterward paid to Crossland & Stonehouse the further sum of £95, which, together with the sums paid by them, and the sum of £233, which the plaintiff claimed to be

paid to them in pursuance of their orders, would make up the full sum of £1200 which was to become due to Crossland & Stonehouse when the buildings should be completed.[1]

Lord Tenterden directed the jury to find a verdict for the plaintiff, if from the evidence they thought that the defendants had ever acknowledged that they held in their hands money for the plaintiff; but he reserved liberty to the defendants to move to enter a nonsuit, if the verdict should be against them. A verdict having been found for the plaintiff, a rule *nisi* for entering a nonsuit was obtained by Sir James Scarlett in last Easter Term.

F. Pollock and *R. V. Richards* now showed cause.

Sir J. Scarlett and *Comyn contra*.

Lord Tenterden, C.J. It is a general rule of law, that a chose in action cannot be assigned. There is, however, an exception to that rule. It has been held that where it has been admitted and agreed beyond dispute that a defined and ascertained sum is due from A. to B., and that a larger sum is due from C. to A., and the three agree that C. shall be B.'s debtor instead of A., and C. promises to pay B. the amount owing to him by A., an action will lie by B. against C. Here, at the time when the defendants were supposed to have admitted that they were responsible to the plaintiff, there was not any defined and ascertained sum due from them to Crossland & Stonehouse. Crossland then asked the defendants for a further advance, which they refused, because they held orders in favor of the plaintiff for payment of more than £200. But *non constat* that that sum was then due from them to Crossland & Stonehouse. It might afterward have been to become due in the progress of the work, which was not at that time completed. It lay upon the plaintiff, in order to bring himself within the cases which form exceptions to the general rule, to show that at the time when the defendants are supposed to have promised to pay him the debt owing to him by Crossland & Stonehouse there was a debt ascertained to be due to them from the defendants. Not having done so, he has not brought himself within the exception to the general rule, and, therefore, the rule for a nonsuit must be made absolute.[1]

Rule absolute.

[1] A portion of the statement of facts has been omitted.—Ed.

JAMES C. CORBETT *v.* JAMES C. COCHRAN.

IN THE COURT OF APPEALS OF SOUTH CAROLINA, JANUARY, 1836.

[*Reported in* 3 *Hill* 41.]

TRIED in Charleston, May Term, 1835, before Earle, J.

The presiding judge made the following report:

"*Assumpsit* on merchant's account, for goods sold and delivered.

"The books were produced and proven by a clerk of the plaintiff who made the entries. So much of the demand as embraced articles delivered to the defendant himself was not disputed. This sum was $92.96. The plaintiff also claimed the further sum of $407.69, for goods charged originally to Mary C. Pellott, a free colored woman, but delivered to her daughter, or furnished for her use, with whom the defendant had some connection. On this point the testimony was, in addition to the books, which established the original charges to Mrs. Pellott, as follows: After the death of the young woman, the daughter, and after the account was rendered in to the mother, the defendant called on the plaintiff, with the account in his hands, and promised to discharge the demand against Mrs. Pellott, by having the amount charged to himself; her account was accordingly credited in full, both in the day book and ledger, by his *assumpsit*, and the amount was charged to the defendant, thus:

1831—November 25, Mrs. Mary C. Pellott,		Cr.
	By J. C. Cochran's assumption,	$407.69
Same day—J. C. Cochran, per self,		Dr.
	Mary C. Pellott's account,	$407.69

"The defendant promised to pay both demands by instalments of $100. After he assumed the payment, plaintiff demanded a note, which defendant refused to give, saying he should not be able to meet it; but if plaintiff would forbear, and wait with him awhile, he would pay by instalments. No length of time was specified for the forbearance. Action was brought April 28th, 1832. The recovery of the plaintiff was resisted, on the ground of the Statute of Frauds, which requires the promise to pay the debt of another to be in writing. I thought the proof made a case to which the statute did not apply. If the goods had been delivered originally to Mrs. Pel-

lott or her daughter, on the parol direct undertaking of the defendant to pay, and they had been debited to him, the debt would have been his, and the undertaking not collateral, and not within the statute. After the goods were debited to Mrs. Pellott, and the credit given to her, it was competent for the defendant, by parol, to make himself liable on an undertaking to pay; if, at the same time, the debt and liability of Mrs. Pellott were entirely released and discharged. In such case the promisor becomes the substitute of the original debtor (2 Con. Rep. 115; 3 M'C. 152), and his undertaking is original, not collateral, as it would be if the original demand were allowed to subsist. In this case it seemed to me that the liability of Mrs. Pellott was extinguished as completely as if the plaintiff had executed a release. It was clearly the intention of the defendant to make himself directly and absolutely liable. 1 N. R. 124; 5 Taunt. 450; 1 B. & A. 297. And a parol undertaking for another, on a new consideration, raised by the promisor, would be good. The discharge of Mrs. Pellott, and the forbearance to himself, would together form a sufficient consideration, uniting an inconvenience to the plaintiff, and a benefit to the defendant as well as to Mrs. Pellott. I instructed the jury that the defendant was liable on his undertaking, and they found for plaintiff the amount of his demand."

The defendant appeals from the above decision, and moves for a new trial upon the ground that his honor erred in charging the jury, that the credit having been given by the plaintiff in his books to Mrs. Pellott for the amount of her account, and the same transferred to the debit of the defendant, was a discharge to Mrs. Pellott, and therefore took the case out of the Statute of Frauds.

I. E. Holmes, for the appellant.

CURIA, per EARLE, J. The case made on the trial below seems to be this: Mrs. Pellott being indebted to the plaintiff in the sum of $407.69, on a book account for merchandise, and the account being presented to her for payment, the defendant came to the plaintiff, produced the account, and assumed to pay it in consideration that she should be discharged from the debt. Her account was accordingly credited in full, and the amount was charged to the defendant by his own direction. In the argument here a question has been raised whether Mrs. Pellott was privy to the arrangement by which the defendant assumed the payment of her debt, and whether the credit discharging her was entered with the knowledge and by the direction of the defendant. Both these were questions for the jury. It was only on proof of both that the liability of the defendant

arose. And I think that the jury were warranted in the conclusion, that the defendant, when he exhibited Mrs. Pellott's account, and assumed the payment of it, came from her and with her assent for that purpose. And also that the credit given to her on the books was by the direction of the defendant, and in pursuance of the agreement with him, for his undertaking was to pay her debt in consideration that she should be discharged. The questions raised below were, first, whether the undertaking was void under the Statute of Frauds, not being in writing; second, whether the debt of Mrs. Pellott was actually discharged. It seems hardly necessary, at this day, to speak of the distinction between original and collateral undertakings in reference to the Statute of Frauds, a distinction so well understood, and so well established by the whole current of authorities. The general rule is well stated in Comyn on Contracts: "If it be part of the agreement that the original debt be discharged, that is a sufficient consideration to support the undertaking of another to pay the debt, and the agreement need not be in writing. But if no such stipulation be made, and the original debt be permitted to subsist, the undertaking is merely collateral, and the agreement must be in writing." Says Nott, J., in Boyce *v.* Owens, 2 M'Cord, 208: "The reason is obvious. The original debt being extinguished, it is no longer an undertaking to pay the debt of another, because there is no such debt existing, but it is a newly created debt of the undertaker." The principle is well put by Roane, J., 2 H. & M. 603, Waggoner *v.* Administrators of Gray: "Where the person on whose behalf the promise is made is not discharged, but the person promising agrees to see the debt paid, so that the promisee has a double remedy, the promise is considered collateral, and must be in writing; but where the promisor undertakes to become the paymaster, it becomes immediately his debt, and he is liable without writing." The consideration to support an agreement need not of necessity be a pecuniary one, nor even a beneficial one, to the person promising. If it be a loss, or even an inconvenience to the promisee, the relinquishment of a right, as the discharge of a debt, or the postponement of a remedy, as the discontinuance of a suit, or a forbearance to sue it is enough. In relation to the class of contracts we are now considering, where the promise is to pay another's debt in consideration of his being discharged, it seems to be well settled now that there need be no consideration moving between the person promised for and the person who promises. For the undertaking of one man for the debt of another, says Lord Eldon, in *ex parte* Minet, 14 Ves. Jr. 190, "does not require a

consideration moving between them." Vid. 9th East. 348; 1 Camp. 242; 8 John. Rep. 29. In the earlier cases on this point such promises seem to have been supported, rather on the ground of their being a purchase of the debt than a mere undertaking to pay. So they seem to be regarded by Roberts in his treatise on the statute. Such was the case in Anstey *v.* Marden (1 New Rep. B. & P. 124, decided in 1804), where A. being insolvent, a verbal agreement was entered into between several of his creditors, and B. who was father-in-law, whereby B. agreed to pay the creditors 10*s.* in the pound, in satisfaction of their demands, which they agreed to accept, and to assign their debts to B., and it was supported as an original undertaking. Sir James Mansfield, C.J., at the trial considered it not within the statute, being an undertaking to pay a debt of a new description, 10*s.* in the pound, in consideration of A. being discharged, and not an undertaking to pay the debt of A. But afterward, on a rule for a new trial, it seems to have been put on the footing of a purchase of the debts. The case of Castling *v.* Aubert, 2 East. 325, had before been determined on the same ground. But it would seem, if no consideration is necessary, as between the person promised for and the person promising, and the loss or inconvenience to the promisee, by reason of discharging the debt of the former, be a sufficient consideration for the new undertaking, that there can be no sufficient reason for holding that the promisor should have the former debt assigned to him for his indemnity, as in Anstey *v.* Marden, or should have funds in his hands to reimburse himself, as in Castling *v.* Aubert; and so it was considered in Goodman *et al. v.* Chase, 1 B. & A. 297, in 1818. The plaintiff had taken Chase, Jr., in execution, and the defendant (his father) in consideration that the plaintiff would discharge him, undertook to put him again in custody on a day certain or pay the debt. Whereupon the plaintiff discharged Chase, Jr., out of custody; and it was held that the promise of the defendant was binding, though not in writing; that it was an original undertaking, and not collateral. Lord Ellenborough said it was unnecessary to hear counsel on the case of Wain and Warlters, inasmuch as it appeared to them that the plaintiff, by agreeing to let Chase, Jr., out of custody, had entirely discharged the debt as to him, and then the case would be that the defendant promised to pay a certain sum of money, in consideration of the debt between the plaintiff and Chase, Jr., being put an end to, which being a detriment to the plaintiff, would be a good consideration for an original promise, and take the question entirely out of the Statute of Frauds. So in Roe *v.* Hough, 1 Salk. 29, soon after

the statute, which I shall presently cite for another purpose, A. was indebted to B., and C. in consideration that B. would accept him, C., as his debtor in the place of A., undertook to pay B. the debt of A. It was held a good consideration and the promise binding, and all the authorities are now to the same effect.

I have thus far remarked on this branch of the case because we have no precedent in our own Reports of an undertaking to pay the debt of another, on the sole consideration of the discharge of such debt. But the exception mainly urged here is that the promise of the defendant was without consideration, as in point of fact and law, the debt of Mrs. Pellott was not discharged. In considering this question we should bear in mind the distinction between a release and payment, between that which is to operate as a relinquishment to the debtor of a right of action, and that which is accepted in discharge or satisfaction of the debt. In regard to the former it is laid down: "An express release must regularly be in writing and by deed, according to the common rule, *eodum modo quo oritur, eodum modo dissolvitur*, so that a duty arising by record, must be discharged by matter of as high a nature, and so of a bond or other deed. But a promise by words may, before breach, be discharged or released by words only." Bac. Abr. Release. But payment or satisfaction of a debt is a different thing. As a general rule a debt existing in parol, whether by writing or otherwise, is not extinguished by a security which is of no higher nature; for instance, a book account would not of necessity be extinguished by the promissory note even of the debtor, unless by express agreement, if it be so accepted by the creditor. 1 Salk. 124; 7 Term, 60; 3 John. Ca. 71; 5 John. Rep. 68; 8 John. Rep. 304. But it is surely competent for the creditor to accept of whatsoever he will in discharge or satisfaction of a debt. If he may accept the promissory note of the debtor, he may also accept that of a stranger. And if he may accept the note of a stranger, he may also accept his promise without writing. The validity of the substitute, the note or promise, depends on the express agreement to discharge the original debt. And to this point the authority of Roe *v.* Hough is express. It was agreed between A., B., and C. that C. should pay A.'s debt to B., and that B. should discharge A.; that B. should accept C. in the place of A. as his debtor; and it was held that A. was thereby discharged and C. bound. A like case is put by Buller, J., in Tatlock *v.* Harris, 3 Term, 174. Suppose A. owes B. £100, and B. owes C. £100, and it is agreed between them that A. should pay C. the £100. B.'s debt is extinguished, and C. may re

cover that sum against A. See also Israel *v.* Douglass, 1 St. B. 239. In these cases the validity of the new promise, and the discharge of the original debt, are mutually dependent; they arise at the same time, and result from the agreement of the parties, that the existing debt shall be extinguished, and the first debtor discharged in consideration of the new undertaking. There is no form of words or writing necessary to give effect to these mutual undertakings. If the promise to pay is binding, the agreement to discharge is equally so; each is binding because the other is. But in the case at bar there is something more than a mere verbal agreement, if more be necessary. The plaintiff, it is true, has not given a receipt, or other written discharge, to the former debtor. But he has entered satisfaction in writing on the books which constituted the evidence of his demand, and has declared by such entry that he has no further claim upon Mrs. Pellott, in whose stead he has accepted the defendant as his debtor. And although he cannot be said to have cancelled the books, the entry furnishes written evidence of his agreement to discharge Mrs. Pellott, in consideration of the defendant's promise. Such agreement, whether proved by writing or parol, was an effectual legal discharge; and after this agreement the plaintiff could not have recovered on the original demand from her. This differs from the case of the assignees of Sweet *v.* James Chadley, 3 B. & A. 591, in an important particular, although in some of their features the cases are identical, and the ground of the decision in that case will illustrate the proposition advanced. James Chadley was indebted to Sweet for goods sold to the amount of £14 1*s*. Robert Chadley was also indebted to Sweet and to James Chadley; Robert directed Sweet to put down the goods, for which James was indebted to the account of him, Robert, and then informed James of this arrangement. Afterward Sweet rendered his account to Robert, with this entry at the foot: "December 1st, 1822. To your brother's account, £14 1*s*." This was all that passed. The assignees brought suit against James Chadley on the original demand. After verdict for plaintiffs on a rule for nonsuit, in the King's Bench, Abbott, C.J., in discharging the rule said: "Sweet is not proved ever to have said, 'I will take you, Robert, as my debtor, and discharge James;' he is not proved ever to have said or done that which would have the effect of discharging James. It is contended by the defendant's counsel that this is accord and satisfaction. But admitting the previous agreement, where is the satisfaction? I consider the entry made by Sweet to mean no more than this: 'I will debit the account of Robert for £14 1*s*., not that I will discharge

James, at all events, from this sum.'" The case of Waggoner *v.* Gray's Administrators, 2 H. & M. 603, 611, will be found to present a similar question, decided on the same principles.

This Court is of opinion that there was not error in the charge of the judge below, and the motion is refused.

DeSaussure, Johnson, Gantt, O'Neall, Johnston, Butler, and Richardson concurred.

WILSON and Another *v.* COUPLAND and Another.

In the King's Bench, November 8, 1821.

[*Reported in* 5 *Barnewall & Alderson* 228.]

Assumpsit. The declaration contained two special counts, and a count for money had and received, and an account stated. Plea, general issue. At the trial at the last Guildhall sittings, before Abbott, C.J., the facts appeared to be these: The defendants were indebted to Taillasson & Co. in the sum of £768, upon the balance of accounts, for money had and received; Taillasson & Co. were indebted to the plaintiffs in a much larger amount; and, being so, they enclosed to the plaintiffs the account current, rendered to them by the defendants, accompanying it with a memorandum at the foot, transferring to the plaintiffs the balance of £768 then due. This being notified to the defendants, a long correspondence between them and the plaintiffs took place, and in the result the defendants, who were creditors to the amount of upward of £4000 of Taillasson and Doussard (two of the firm of Taillasson & Co.), finding that they could not set off the one debt against the other, sent to the plaintiffs the following note, dated August 14th, 1820: "Three months after date we promise to pay Messrs. Wilson & Blanshard, or order, seven hundred and sixty-eight pounds due to Taillasson & Co., unless otherwise provided for by an arrangement with Mr. Colton, in St. Lucia, in favor of Messrs. W. & B." No arrangement was afterward made in St. Lucia in favor of Wilson & Blanshard, but Mr. Colton, in St. Lucia, made an arrangement, and got the following receipt, dated September 12th, 1820, from Taillasson & Co.: "We acknowledge to have received from Messrs. W. Coupland & Co. the sum of seven hundred and sixty-eight pounds sterling, for balance of account due to us on the thirty-first December last, which said sum is to be deducted from the balance of account due to them by Taillasson and Doussard on the date aforesaid." Abbott,

C.J., was of opinion, at the trial, that on August 14th, 1820, the defendants were to be considered as debtors to the plaintiffs in the sum of £768, to be paid in three months, subject only to the possibility of intermediate arrangements in favor of Wilson & Blanshard, being made by Mr. Colton, at St. Lucia, and that no such arrangement having been made, the plaintiffs were entitled to recover upon the count for money had and received. The plaintiffs accordingly had a verdict. And now

Marryat, by leave, moved to enter a nonsuit.

ABBOTT, C.J. I was not free from doubt at the trial, but I am now satisfied that the verdict is right. The facts are these: The plaintiffs were creditors, and the defendants debtors, to Taillasson & Co.; and, by the consent of all parties, an arrangement was made that the defendants should pay to the plaintiffs the debt they owed to Taillasson & Co., and as the demand of Taillasson & Co. on the defendants was for money had and received, it seems to me that the defendants, by acceding to this arrangement, made themselves liable for money had and received to the use of the plaintiffs. Thus the case stands independently of the note. But it seems to me that the note makes no difference, for although it might, perhaps, be at first conditional, yet afterward the condition ceasing, it became an absolute promise, and if so, the defendants have absolutely acceded and are liable to the consequences of the arrangement. The verdict, therefore, is right.

BAYLEY, J. The legal effect of what has taken place is this: Coupland & Co. are indebted to Taillasson & Co. to the amount of £768 for money had and received. The latter being indebted to the plaintiffs, a bargain takes place by which Taillasson & Co. agree that the money had and received by the defendants to their use shall be money had and received to the use of the plaintiffs. To this arrangement the defendants assent. Then their assent makes them debtors, and liable to an action of money had and received to the use of the plaintiffs. The agreement of August 14th seems to me to be absolute and not conditional. It is in effect an agreement to give the defendants three months in which to pay the balance, which is an advantage to them; and the defendants agree to pay it then in England, unless the plaintiffs are, in the mean time, paid in the West Indies. That is, as it seems to me, an absolute promise. I am, therefore, of opinion that this action is maintainable, and that there ought to be no rule.

HOLROYD, J., concurred.

BEST, J. A chose in action is not assignable without the consent of all parties. But here all parties have assented, and

from the moment of the assent of the defendants, it seems to me that the balance of £768 became money had and received to the plaintiffs' use. It is said that the promise was conditional. That may, perhaps, be doubtful, but supposing it to be conditional, the event has happened upon which it became absolute.

Rule refused.

COMPTON *v.* JONES.

IN THE SUPREME COURT OF NEW YORK, FEBRUARY TERM, 1825.

[*Reported in* 4 *Cowen* 13.]

ON demurrer. The declaration was in *assumpsit*. The first count stated that on February 4th, 1823, the defendant made, etc., his certain deed, etc., dated, etc., and delivered the same to one S. T. Wood, by which he, for value received, promised to pay Wood or bearer $500 in four equal annual instalments from the date; that Wood afterward, etc., for a valuable consideration to him (Wood) paid, assigned, and transferred the deed, etc., to the plaintiff, thereby constituted him the bearer thereof, and authorized and directed him to demand and receive of the defendant the contents of the deed, etc., for his own benefit; that afterward, and before the payment, etc., the plaintiff gave notice to the defendant of the assignment, etc.; that, in consideration of the premises afterward, etc., in consideration that the plaintiff would accept and agree to the defendant's promise in the declaration after mentioned, the defendant promised the plaintiff to pay him the money mentioned in the deed, averring that $250 had become due before the commencement of the suit.

General demurrer and joinder.

C. M. Lee in support of the demurrer.

Z. A. Leland, contra.

SAVAGE, C.J., remarked that what was said by the Court in the authority cited by the defendant's counsel, was intended of a case where the action was brought by the party to the specialty. And the whole Court were clear, that the action was sustainable, being on a promise to the assignee.

Judgment for the plaintiff.

LIVERSIDGE *v.* BROADBENT.

IN THE EXCHEQUER, TRINITY TERM, 1859.

[*Reported in* 4 *Hurlstone & Norman's Reports* 603.]

THE declaration stated that at the time of the making the agreement hereinafter mentioned, the defendant was indebted to one William Clapham in a sum of money exceeding £113 13*s*. and the interest and expenses hereinafter mentioned. And the said W. Clapham was then indebted to the plaintiff in a sum of money equal to the sum of £113 13*s*. and the interest and expenses hereinafter mentioned, for which said sum of £113 13*s*. the plaintiff then held two several bills of exchange for £60 and £53 13*s*. respectively drawn by the plaintiff on the said W. Clapham and accepted by him payable to the plaintiff, and then unpaid ; and the said several debts and the said two bills of exchange with the said interest and expenses being wholly unpaid, it was agreed by and between the plaintiff, the defendant, and the said W. Clapham, in the words and figures following—that is to say, " Wetherby, September 22d, 1858. I hereby agree to authorize Mr. Stephen Broadbent, of Wetherby (meaning the defendant), to pay Mr. William Liversidge (meaning the plaintiff), or his order, the sum of £113 13*s*., the amount of two acceptances (meaning the said two bills of exchange), together with the expenses on the said two bills (meaning the said two bills) and interest thereon toward my account for building the cottages at Wetherby. Mr. Broadbent (meaning the defendant) to debit my account (meaning the said W. Clapham's account) with the above money, also Mr. Liversidge's (meaning the plaintiff) receipt to Mr. Broadbent (meaning the defendant), I (meaning the said W. Clapham) acknowledge shall be binding between myself and the said Mr. Broadbent, in the contract. William Clapham. Acknowledged, Stephen Broadbent." Averments : that on the making of the said agreement the plaintiff accepted the same in full satisfaction and discharge of the said debt so due and owing to him by the said W. Clapham ; and that the said W. Clapham also accepted the same in full satisfaction and discharge of the said debt so due and owing to him by the defendant ; and that neither the plaintiff nor the said W. Clapham have at any time demanded their said several debts so discharged as aforesaid ; and that all conditions precedent have been fulfilled and everything has been done and has happened to entitle the plaintiff to the sum of £113 13*s*., and the said sum of £113 13*s*. is still

wholly unpaid to the said W. Clapham, and the said several bills are also wholly unpaid. Breach, non-payment of the said sum of £113 13*s*. There were also counts for money payable by the defendant for the use of the plaintiff, and money due on an account stated.

Pleas *inter alia*. First, that it was not agreed by and between the plaintiff and defendant and the said W. Clapham, nor did the said W. Clapham give any such authority as in the alleged agreement mentioned. Secondly, that the plaintiff did not accept the said agreement in full satisfaction and discharge of the alleged debt alleged to have been due and owing to him by the said W. Clapham; nor did the said W. Clapham accept the said agreement in full satisfaction and discharge of the said alleged debt alleged to have been due and owing to him from the defendant.

Issues thereon.

At the trial before Willes, J., at the last Yorkshire Assizes, it appeared that the defendant had contracted with a builder, named Clapham, for the erection of some cottages at Wetherby. Clapham being indebted to the plaintiff, who was a timber merchant, had accepted two bills of exchange drawn by the plaintiff on him. One of these bills, which was for £60, became due on September 18th, 1858, and was dishonored; the other bill, which was for £53 13*s*., was not due until October 15th following. The plaintiff, requiring some security for his debt, proposed to Clapham that the defendant should guarantee the payment, and on September 22d the plaintiff and Clapham went to the defendant, when the following document was signed:

"WETHERBY, September 22, 1858.

"I hereby agree to authorize Mr. Stephen Broadbent, of Wetherby, to pay to Mr. W. Liversidge, or his order, the sum of £113 13*s*., the amount of two acceptances, together with the expenses on the bills and interest thereon, toward my account for building the cottages at Wetherby; Mr. Broadbent to debit my account with the above money: also Mr. Liversidge receipt to Mr. Broadbent I acknowledge shall be binding between myself and Mr. Broadbent in the contract.

"WILLIAM CLAPHAM.

"Acknowledged, STEPHEN BROADBENT."

It was objected, on the part of the defendant, that the agreement was no extinction of the debt due from the defendant to Clapham, and, consequently, there was no consideration for the promise. The learned judge directed a nonsuit, reserving leave to the plaintiff to move to enter the verdict for him.

T. Jones (*Manisty* with him) now showed cause.

The Court then called on

Edward James and *Cleasby* to support the rule.

POLLOCK, C.B. We are all of opinion that the rule ought to be discharged. Looking at the document alone, I do not know what passed, but there was evidence that Liversidge, the plaintiff, wanting some security for a bill of exchange which was overdue, and for another bill which was about to become due, got Clapham, his debtor, to sign this paper: "I hereby agree to authorize Mr. Stephen Broadbent, of Wetherby, to pay to Mr. Liversidge, or his order, the sum of £113 13*s.*, the amount of two acceptances, together with the expenses on the bills and interest thereon." Now the mode by which Clapham would naturally authorize the defendant to pay the money to the plaintiff or his order would be by drawing on him a bill of exchange payable to the plaintiff's order. In this respect the case differs from those relied upon by the plaintiff. The document goes on "toward my account for building the cottages at Wetherby. Mr. Broadbent to debit my account with the money." That does not mean "instanter," so as to transfer the debt, but "debit my account with the money when you have paid it." All that the defendant does is to add the word "acknowledged," with his signature, which may only mean that he has received the agreement, and that when he gets the authority he will act upon it. I cannot see that there is any distinct agreement whatever, at least to the effect stated in the first count. The debt due from Clapham to the plaintiff is not extinguished, and there is nothing in the document to prevent the plaintiff from suing Clapham instanter on the bills of exchange. No plea founded on that document would afford any defence to the action. It is not necessary to go through the cases cited on the part of the plaintiff, because none of them apply. For these reasons I think that the learned judge was right in directing a nonsuit.

MARTIN, B. I am of the same opinion. There are two legal principles which, so far as I know, have never been departed from; one is that at common law a debt cannot be assigned, so as to give the assignee a right to sue for it in his own name, except in the case of a negotiable instrument; and, that being the law, it is perfectly clear that Clapham could not assign to the plaintiff the debt due from the defendant to him. That a debt may be assigned in equity there is no doubt, and I should rejoice if the scandal did not exist of there being one rule at law and another in equity. The other principle which would be infringed by allowing this action to be maintained, is the

rule of law that a bare promise cannot be the foundation of an action *ex nudo pacto non oritur actio*. Applying those principles to the present case, I am clearly of opinion that the action cannot be maintained. The document begins, "I hereby agree to authorize Mr. Stephen Broadbent, of Wetherby, to pay to Mr. W. Liversidge, or his order, the sum of £113 13*s*." That is nothing more than an agreement to authorize the defendant to pay to the plaintiff or some one in his stead, and the signature of the defendant has no other meaning than that pointed out by the Lord Chief Baron. Nevertheless, I will assume that the defendant did promise to pay the money to the plaintiff, then there is the objection of a want of consideration to support the promise. The document goes on, "Mr. Broadbent to debit my account with the above money." If I thought that meant this, "You may now take a pen and write down £113 13*s*. to my debit, and thereby extinguish so much of your debt," I should agree with the plaintiff's counsel. But that is not the meaning of the document. The following words "also Mr. Liversidge's receipt to Mr. Broadbent I acknowledge shall be binding between myself and Mr. Broadbent in the contract," clearly show that the real meaning is—viz., that when the defendant has paid the money to the plaintiff and got his receipt for it, then, and not before, he is to debit Clapham's account with the money so paid. No doubt a debtor may, if he thinks fit, promise to pay his debt to a person other than his creditor, and if there is any consideration for the promise he is bound to perform it. But here there was none whatever. There was no agreement to give time, or that the debt of Clapham should be extinguished, no indulgence to him or detriment to the plaintiff. There was nothing in the nature of a consideration moving from the plaintiff to the defendant, but a mere promise by the defendant to pay another man's debt. No doubt there are cases in which the courts have been desirous to give their sanction to arrangements of this kind. Among others Lilly *v.* Hays, 5 A. & E. 548, was cited. But in that case the defendant had a sum of money in his hands which he admitted that he held for the plaintiff's use, and promised to pay to him, so that he was in the situation of an agent for the plaintiff, and on that ground it was held the plaintiff might recover it as money received to his use. The same observation applies to the case of Walker *v.* Rostron, 9 M. & W. 411. There the agent for the purchaser of goods undertook, by an agreement to which the vendor and purchaser were also parties, to pay bills of exchange, given for the price of the goods, out of certain specified funds which he expected to receive, and that

was held to be an appropriation of the funds, irrevocable except by the consent of all parties. The same principle prevails with respect to bankers. A banker is in the position of a person having in his hands the money of another which he is at any moment liable to be called upon to pay, and the courts have grasped at that to make a contract between the banker, his customer, and a third party, for the payment of money to the latter, operate as a transfer of the money, so that an action for money had and received can be maintained for it. Here there is no money had and received to the use of the plaintiff. In Israel *v.* Douglas, 1 H. Black. 239, there was a consideration to support the promise. Here there is nothing more than a transfer of a chose in action ; and, without violating the two rules of law to which I have adverted, this action cannot be maintained.

BRAMWELL, B. I am of the same opinion. Where the action for money had and received is maintainable, it is because certain facts exist, which, if fully stated on the record, would entitle the plaintiff to maintain an action. Whether the count for money had and received is the proper form or not, is immaterial if there is a right of action. Test it in this way : Suppose the jury returned a special verdict, it would then be seen whether money had and received was maintainable. I am by no means clear whether my Lord's doubt as to there being any agreement by the defendant is well founded ; but I do not decide on that ground, because it seems to me a question for the jury. My judgment proceeds on the grounds stated by my Brother Martin —viz., that no man can be made liable on a contract without a consideration to support it, and that a chose in action is not assignable at law. I construe this document, not as an agreement that the defendant shall forthwith debit Clapham with the amount of the bills, and that the plaintiff shall give up his claim upon him, but as an authority to the defendant to pay the plaintiff that amount, and when he has done so, to debit Clapham's account with the money. Then what consideration is there for a promise by the defendant to pay Clapham's debt? The defendant must be liable (if at all) by reason of some duty arising from contract ; and that must be founded on a good consideration. In 2 Wms. Saund. p. 137*g*, it is said : "The consideration to support an *assumpsit* must move from the plaintiff." Again, at p. 137*h* : "Any act of the plaintiff from which the defendant or a stranger derives a benefit or advantage, or any labor, detriment, or inconvenience sustained by the plaintiff, however small the benefit or inconvenience may be, is a sufficient consideration, if such an act is performed or such in-

convenience suffered by the plaintiff with consent express or implied of the defendant." Here the plaintiff was under no obligation to do any act, or to forbear, or to suffer any inconvenience. I cannot see any consideration whatever for the promise, and therefore it is clear to my mind that the action is not maintainable. Then as to the authorities, Crowfoot *v.* Gurney, 9 Bing. 372, is a good authority for the plaintiff in the marginal note ; but if the law is to be read from the body of the case, it is against him, because the Court say that there was merely an equitable assignment of the debt. Walker *v.* Rostron, 9 M. & W. 411, may be supported on this ground, that there was an agreement between the three parties that certain moneys which the defendant expected to receive should, when received, be held by him on behalf of the plaintiff. If I direct my agent to receive my rent about to become due, not on my account, but for C. D., and that is assented to by all parties, when the rent is paid it would be received on account of C. D. In Walker *v.* Rostron, 9 M. & W. 411, 419, Parke, B., in the course of the argument, makes use of this expression : " Is not an equitable assignment of a chose in action the same in equity as the assignment of a chattel at law ? Then this is the case of a plaintiff suing the party who has agreed to become his agent for the amount of that equitable lien." That must be the principle upon which that judgment proceeded. At first I was inclined to think that Hamilton *v.* Spottiswoode, 4 Exch. 200, was in the plaintiff's favor, but now I think it is not, because in that case there was a consideration moving from the plaintiff. The declaration is ingeniously drawn, and contains an averment that the plaintiffs have waited for payment until the days mentioned in the order.

Rule discharged.[1]

ISABELLA A. ADAMS *v.* J. L. POWER.

In the Supreme Court of Mississippi, April Term, 1873.

[*Reported in* 48 *Mississippi* 450.]

Error to the Circuit Court of Hinds County, First District. Brown, J.

The opinions of the Court contain a full statement of the case.

Johnston and *Johnston* for plaintiff in error.

Harris and *Withers* for defendant in error.

No briefs on file.

[1] The concurring opinion of Watson, B , has been omitted.—Ed.

PEYTON, C.J. Isabella A. Adams instituted an action of *assumpsit* in the Circuit Court of Hinds County, against J. L. Power, on a promissory note for $3750, made by the said J. L. Power and B. F. Jones, on February 11th, 1867, payable to Asa R. Carter and John H. Cook on January 1st, 1869, and by them transferred by endorsement to the plaintiff, without recourse to them as endorsers thereof, on April 24th, 1867.

To this action the defendant pleaded the general issue, and a special plea in bar, setting up a contemporaneous agreement in writing, under seal, executed by Jas. J. Shannon, and the said B. F. Jones and J. L. Power, by which the said Shannon covenants as agent for said Carter and Cook, to canvass and act as agent for the *Clarion* newspaper, conducted by said Power and Jones, and use his best efforts to procure advertisements and subscriptions for said paper, and agrees, on behalf of said Carter and Cook, to procure subscriptions and advertisements, unless prevented by death or sickness, to pay the note sued on and to collect the bills for advertisements and subscriptions thus procured, and pay the debt. And the said Power and Jones covenant to supply the subscribers to and publish the advertisements in said newspaper, that may be procured by the said Shannon as aforesaid. And the plea avers that the defendant has always been ready and willing, and offered to perform his part of the agreement, but that the said Shannon, although not prevented by either of the casualties mentioned in the agreement, has wholly failed to perform the covenants made by him as aforesaid, as agent and attorney for said Carter and Cook, nor have they performed their part of said agreement, and concludes with a verification.

To this special plea the plaintiff demurred, and the demurrer was overruled by the Court. And upon a replication in short by consent to this plea, traversing the same, the cause was submitted to a jury, who found a verdict for the defendant. And thereupon the plaintiff made her motion to set aside the verdict, and for a new trial, on the following grounds :

2. The jury found contrary to the evidence.

3. The Court erred in giving the instructions asked by the defendant.

In the determination of this case, we deem it necessary to consider only the second and third assignments of error, as the disposition of these will be decisive of all the questions presented by this record for adjudication.[1]

This case, although new in the instance here, is yet believed

[1] The other assignments of error have been omitted from the statement of facts.—ED.

to be governed by well-settled principles of law, as laid down by elementary writers upon contracts when treating of the doctrine of novation.

In the civil law there are three kinds of novation. 1. Where the debtor and creditor remain the same, but a new debt takes the place of the old one. 2. Where the debt remains the same, but a new debtor is substituted for the old one. This transaction is called delegation. Domat lays down the essential distinction between delegation and any other novation, thus: that the former demands the consent of all three parties, but the latter that only of the two parties to the new debt. 3. Where the debt remains the same, but a new creditor is substituted for the old one. This is also called delegation, for the reason above given, to wit, that all three parties must assent to the new bargain.

Delegation is the change of one debtor for another, when he who is indebted substitutes a third person who obligates himself in his stead to the creditor; so that the first debtor is acquitted and his obligation extinguished, and the creditor contents himself with the obligation of the second debtor. 1 Domat, 919, § 2318. And in § 2319 the same author says: "Delegation is not made but by the consent both of the debtor who delegates another in his place of the person who is delegated, and of the creditor who accepts the delegation, and who contents himself with the new debtor."

The common law doctrine of novation mainly agrees with that of the civil law, but in some parts differs from it. Tallock *v.* Harris, 3 T. R. 180, is a leading case of novation at the common law. In that case, it was ruled that, "if A. owes B. £100, and B. owes C. £100, and the three meet and it is agreed between them that A. shall pay to C. £100, B.'s debt is extinguished, and C. may recover that sum against A."

There must always be a debt once existing, and now cancelled, to serve as a consideration for the new liability. The action in all cases is brought on the new agreement. But in order to give the right of action, there must be an extinguishment of the original debt. 4 B. & C. 163; 1 Mees. & W. 124; 14 Ill. 34; 4 La. Ann. 281; 15 N. H. 129. A good novation is an accord executed. 5 Barn. & Ad. 925; 3 Nott & McCord, 171; 24 Conn. 621.

In that kind of novation, called in the civil law delegation, no new creditor could be substituted without the debtor's consent. This rule is observed in the common law. Hence, without this consent and promise to pay, a new creditor can have no action against the debtor, because there is no privity of

contract between them. To establish such privity, there must be a new promise founded on sufficient consideration. And the extinction of the prior debt is a sufficient consideration in such case. 14 East, 582 ; 5 Wheat. 277 ; 12 Ga. 406 ; 7 Harris & Johns. 213, 219 ; 21 Me. 484.

When assent or consideration is wanting, the novation operates only as a species of collateral security. This assent on the part of the debtor is said to be essential, for the reason that he may have an account with his assignor ; and he shall not be barred of his right to a set off, or any defence he may have. Still, if anything like an assent on his part can be inferred, he will be considered as the debtor. 4 Esp. 203 ; 6 Tex. 163.

It is laid down by Parsons on Contracts, as a principle deducible from the cases upon this subject, that if A. owes B., and B. owes C., and it is agreed by these three parties that A. shall pay this debt to C., and A. is by this agreement discharged from his debt to B., and B. is also discharged from his debt to C., then there is an obligation created from A. to C., and C. may bring an action against A. in his own name. This would be no contradiction or exception to the ancient rule, that a personal contract cannot be assigned so as to give the assignee a right of action in his own name. It is the case of a new contract formed and a former contract dissolved ; and the general principles in relation to consideration attach to the whole transaction. Thus, to give the transaction its full legal efficacy, the original liabilities must be extinguished ; for, if the debt from A. to B. be not discharged by A.'s promise to pay it to C., then there is no consideration for this promise, and no action can be maintained upon it ; but, if this liability be discharged, then it is a sufficient consideration, and if, at the same time, C. gives up his claim on B., as the ground on which B. orders A. to pay C., then the consideration for which A. promises to pay C. may be considered as moving from C. 1 Pars. on Cont. 218–220.

An important rule of novation is, that the extinction of the debt destroys also all rights and liens appertaining thereto. Hence, if any hypothecations be attached to the old contract, they will be cancelled by the new one, unless express words retain them. The second contract is simple and independent, and upon its terms the action is brought. Hence, too, the new parties cannot avail themselves of defences, claims, and set-offs which would have prevailed between the old parties. 2 Bouv. L. D. 242. This necessarily results from the extinguishment of the old liabilities and the creation of the new relation of debtor and creditor.

Let us now apply these principles to the case under consideration, and thereby ascertain whether the defence set up by the defendant in this action can avail him ; and, for this purpose, we must recur to the facts of the case, and the evidence in support of the defence and that in support of the action, as they appear in the record.

The promissory note in suit, and read in evidence in this case, is as follows :

"$3750. JACKSON, MISS., February 11th, 1867.

"On the first day of January, 1869, we promise to pay Asa R. Carter and John H. Cook, the sum of thirty-seven hundred and fifty dollars, to bear interest from date at eight per cent per annum, until paid, for value received.

"J. L. POWER,
"B. F. JONES."

The defendant, Power, testified that this note was given for the purchase by him and the said B. F. Jones, from J. J. Shannon of one-quarter interest in the *Clarion* newspaper establishment. He further testified that the note was made payable to Carter and Cook at the request of the said Shannon, who said he was indebted to them and wanted the note made payable to them, that he might hand them the note. That neither said Carter or Cook, or plaintiff, was present at the time, and that witness had no knowledge that either of those persons ever assented to the written argument in reference to advertising and subscriptions, or that they knew of the existence of such contract.

This testimony of defendant, Power, is corroborated by that of the plaintiff, Mrs. Adams, who testified that as administratrix of the estate of her late husband, S. R. Adams, deceased, she sold the *Clarion* office, then located in Paulding, and formerly conducted by her said husband, to J. J. Shannon, and that Carter and Cook, the payees of the note sued on, were Shannon's sureties for such purchase, and that she received the note sued on from Carter and Cook in payment of such indebtedness ; that she knew nothing at all of any contract that the note sued on was to be paid by advertisements ; that she never heard anything of that matter until this litigation was commenced ; that she took the note as assignee for value and in good faith.

This evidence shows a transaction in which Power was indebted to Shannon, and Shannon was indebted to Carter and Cook ; and Power, at the request of Shannon, executed his note for the debt to Shannon, to Carter and Cook, which, when received by them and endorsed to the plaintiff without recourse

to them in payment of a debt, was a discharge of Power's liability to Shannon, and of Shannon's liability to Carter and Cook, whose assent to this transaction is established by their taking Power's note and passing it off for valuable consideration without recourse. Power knew at the time that he gave the note that it was intended to pay a debt of Shannon to Carter and Cook, because Shannon told him so, and as the evidence shows that Carter and Cook were not present when the agreement was made to pay the note in advertisements and in subscriptions to the *Clarion* newspaper, and that the plaintiff knew nothing of that agreement until the commencement of this suit, it is very clear that neither of these parties could be affected by it.

The giving of the note by Power to Carter and Cook, and their acceptance of the same, had the effect in law of paying two debts, to wit, the debt of Power to Shannon, and the debt of Shannon to Carter and Cook, and created a new liability of debtor and creditor between Power and Carter and Cook, which could not in any way be affected by any collateral agreement between Power and Shannon, and of which Carter and Cook had no knowledge, and which was made by Shannon without their authority, although he may have assumed to act as their agent and attorney, and have so stated himself to be in the agreement. There is no evidence in the record to show that Shannon had any authority from Carter and Cook to enter into the agreement on their behalf, which is relied on as a defence to this action, and without such authority the agreement would not bind them. But, upon reference to the deed containing the terms and covenants of the agreement, it will be seen that it was signed and sealed by Jas. J. Shannon in his individual capacity, and not as agent or attorney for any person, and he alone is bound by the covenants entered into by him.

In no aspect in which this case can be viewed was the agreement legal evidence as between the parties to this suit, and therefore the Court erred in allowing it to be read as evidence upon the trial of the cause.

This agreement was a collateral contract between Shannon and Power, and could not affect those who were not parties to it. For it is laid down by high authority, and is sustained by reason, that a contemporaneous collateral contract must be between the parties to the note, and no others, in order to be available, since it is only to avoid circuity of action that such a covenant is pleadable at law. Hence, such a contract between the defendant and Shannon, that this or that condition shall be

engrafted on the note, is no defence to the note. The agreement, though contemporaneous, is yet collateral and independent, for it cannot be averred to be parcel of the contract in suit, because, in order to be parcel, it ought to be between the same parties. If the parties to the note and to the agreement are not the same, cross actions must be resorted to, and not pleas in bar. 2 Parsons on Notes and Bills, 536. If Power has sustained damage by the failure of Shannon to perform his covenants with him, his remedy is in an action against Shannon on the agreement for the non-performance of the covenants therein contained. There is no evidence in the record to show, or even tending to show, that Shannon had any authority from Carter and Cook to make the agreement on their behalf, or to use their names in any way in connection therewith ; but, on the contrary, the evidence abundantly shows that neither of them was present when the same was entered into by Shannon, and could not at that time have had any knowledge of it. It is very apparent, from the whole transaction and testimony in the cause, that Shannon assumed to bind Carter and Cook in an agreement with Power, made in their absence and without authority from them, and, therefore, they were in no way bound by it. For the reasons last above stated, we are of opinion that said agreement was improperly admitted in evidence.

This brings us to the second assignment of error, which comprehends within its scope all the subsequent assignments of error, which impeach the propriety of the action of the court below in giving and refusing instructions upon the trial of the cause.

The court below very properly gave to the jury the seventh instruction asked by the plaintiff, which is as follows : " Unless defendant, by his proof, connected Carter and Cook with knowledge of the advertising contract, and a sanction of the same, plaintiff is not bound thereby ;" but refused to give the second instruction asked by the plaintiff, which is as follows : " If the jury believe, from the evidence, that Carter and Cook, the payees of the note sued on, gave no agency to J. J. Shannon to make the collateral contract as to advertising ; that they knew nothing of any such defeasance to the payment of the said note up to the time of endorsing the same to the plaintiff ; that plaintiff herself knew nothing of such contract in reference to advertising ; and that Powers and Jones made the note payable to Carter and Cook absolutely, and knowing that said note was to be delivered to said Carter and Cook as payees, and that the consideration of said note was for one-fourth

interest in the *Clarion* office, which the makers of the note have realized and enjoyed without any failure of such consideration, then the law is for plaintiff, and the jury should find for her." It is difficult to conceive upon what ground this instruction was refused. It certainly propounded the law correctly as applicable to the facts of the case, developed by the testimony in the cause, and should have been given, and the refusal to do so by the Court was well calculated to mislead the jury, and, being inconsistent with the seventh instruction, it left the jury without any legal guide to direct them in the finding of their verdict.

The fourth instruction asked by the plaintiff is the following: "If the jury believe from the evidence that the defendant made the note sued on payable to Carter and Cook, and relied alone upon Shannon as to the advertising contract, without any agreement in reference thereto with Carter and Cook, or the plaintiff, then the jury should find for the plaintiff the amount of the note sued, and interest at the rate specified in said note." And the fifth instruction asked by the plaintiff is in the following language: "If the jury believe from the evidence that there has been no failure of consideration in the case, and no payments made, and no set-off or discount established, they should find for the plaintiff." These instructions are believed to be correct legal propositions, and should have been given to the jury, and the refusal of the Court to give them to the jury is error.

In the views already expressed of this case, it will be perceived that we have anticipated and answered all the instructions given for the defendant, except the second, which is couched in the following terms: "The note sued on in this cause being negotiable only by virtue of our statute, the makers are entitled to the same defences against the holder by written assignment, which they would have against the payee, and this whether the holder had notice of such defences or not." Under the provisions of our statute, this instruction undoubtedly announces a correct legal proposition, but its vice consists in its inapplicability to the facts of the case. We have already shown that Carter and Cook were not bound by the collateral contemporaneous agreement entered into by Shannon and Power, and therefore it constitutes no defence as between the maker and payees of the note, and, consequently, it is no defence in this action. It is conceded that if the agreement would have been a good defence to an action on the note, brought by the payees against the maker, it would be equally so in the action brought by the plaintiff, who, as assignee, took

the note subject to all defences, to which the defendant is entitled under the statute, growing out of the want of lawful consideration, failure of consideration, payments, discounts, and set-offs, made, had or possessed against the same, previous to notice of assignment, in the same manner as though the suit had been brought by the payee. This instruction was an abstract proposition of law, inapplicable to the facts of the case, and therefore should not have been given to the jury.

If this defence prevailed, the result of the transaction would be, that Shannon would have his debts extinguished, and Power would get his interest in the *Clarion* printing establishment for nothing, and Mrs. Adams, the *bona fide* holder of Power's note, would be wholly without remedy, in consequence of Shannon's failure to perform his collateral engagement with Power, because she took the note in discharge of Carter and Cook's liability, and in payment of Shannon's note given for the *Clarion*, and therefore she can have no recourse upon these parties or either of them. Such results cannot rightfully and properly be worked out through the medium of the law.

For the reasons herein stated, the judgment must be reversed, and the cause remanded for a new trial.[1]

PARSONS ET AL. *v.* TILLMAN ET AL.

IN THE SUPREME COURT OF INDIANA, MAY TERM, 1884.

[*Reported in* 95 *Indiana* 452.]

FROM the Vanderburgh Circuit Court.

A. Iglehart, *J. E. Iglehart*, *A. Gilchrist*, and *C. H. Butterfield* for appellants.

C. Denby, *D. B. Kumler*, *A. C. Tanner*, and *W. W. Ireland* for appellees.

NIBLACK, J. Henry E. Blemker, William H. Tillman, and Michael Gorman for many years constituted the firm of Blemker, Tillman & Co., engaged in the manufacture and sale of stoves and other kindred articles of merchandise at Evansville, in this State.

At the time of its dissolution Byron Parsons and Charles E. Scoville were endorsers for the firm in the aggregate sum of more than $20,000.

In May, 1882, Blemker, Parsons, and Scoville filed their complaint in the court below against Tillman, Gorman and others,

[1] The dissenting opinion of Tarbell, J., has been omitted.—ED.

praying, among other things, a dissolution of the firm and the appointment of a receiver to close up its business, and the proceedings which followed resulted in the dissolution of the firm and the appointment of a receiver.

On June 28th, 1882, Sophia Tillman, the wife of William H. Tillman, above named, having become the owner and holder of certain promissory notes executed by the firm to one Mary Raben, her stepdaughter, obtained judgment in the Superior Court of Vanderburgh County against Blemker, Tillman & Co. upon those notes for $3581.38. Afterward Mrs. Tillman filed the judgment thus obtained as a claim against the assets in the hands of the receiver, and asked for an order for its payment as a partnership claim. Parsons and Scoville thereupon, as creditors of the firm, filed objections to the allowance of the claim.

Issues were formed upon the objections thus filed, and at the request of Parsons and Scoville, the Circuit Court made a special finding of the facts, which may be stated as follows :

That prior to May 14th, 1878, the members of the firm of Blemker, Tillman & Co. made an agreement between themselves by which each was to receive from the firm a compensation for his services ; that is to say, Blemker was to be paid $1500 per year, and Tillman and Gorman each $4 a day ; that Blemker and Gorman each drew his wages in cash from the firm, but that Tillman instead took the notes of the firm from time to time for the services which he performed, covering a period of ten years immediately preceding said May 14th, 1878, at which time these notes amounted in the aggregate to $3000 ; that on that day, desiring to make a gift or advancement to his daughter, Mrs. Mary Raben, Tillman surrendered these notes and had new notes executed by the firm for like amounts, payable to her ; that no consideration for these new notes moved from Mrs. Raben either to Tillman or the firm ; that two other notes of $200 each were afterward given to Mrs. Raben by the firm for interest on the notes which her father had caused to be executed to her as above ; that in March, 1882, Mrs. Raben transferred all the notes which had been so executed to her by the firm, to the appellee, Mrs. Sophia Tillman, who had then but recently become her father's wife ; that the only reason for this transfer was that Tillman, the father, had complained at having been compelled to pay the sum of $1500 as surety for Mrs. Raben's husband ; that at the time the first notes were given to Mrs. Raben the firm owed $49,296.46, and owned property of the value of $70,250.46 ; that at that time Parsons and Scoville were endorsers for the firm for about

$20,000, and so continued up to the time the firm was dissolved, and are now creditors for sums paid as such endorsers for the firm for more than $20,000 ; that in May, 1882, a receiver was appointed for the firm ; that the receiver has converted all the assets into money, and has paid all the money into Court ; that the creditors of the firm will receive less than fifty cents on each dollar due them ; that the judgment constituting the claim in controversy was recovered by Mrs. Tillman on the notes transferred to her by Mrs. Raben, and that there was then due on said judgment, for principal, interest, and costs, the sum of $3630.38.

From these facts the Court came to legal conclusions as follows :

First, that at the time of the execution of the notes to Mrs. Raben the firm of Blemker, Tillman & Co. was solvent.

Second, that while the firm was solvent these notes could be lawfully assigned by Tillman, with or without a valuable consideration, they having the ordinary qualities of choses in action.

Third, that the execution of the notes to Mrs. Raben in lieu of those held by her father was a fair transaction, and operated as an assignment of the original notes held by Tillman.

Fourth, that by receiving these notes as a gift from her father, Mrs. Raben acquired a valid title to them, which was not affected by the subsequent insolvency of the firm.

Fifth, that by the transfer of the notes from Mrs. Raben, the appellee, Mrs. Tillman, acquired a valid title to them in her own right.

Sixth, that the judgment rendered upon these notes ought to be allowed as a general claim against the firm.

Exceptions were reserved, and an allowance was made accordingly.

Parsons and Scoville have appealed, and assigned error upon the conclusions of law at which the Circuit Court arrived.

Much of the argument submitted on behalf of the appellants has reference to the general relations which partners sustain to the copartnership, and to the rights and liabilities of a partner who has made advancements to an insolvent firm. But we are unable to make any practical application of the principles relied on to the case in hearing. It is inferentially conceded that Tillman, in good faith, performed services sufficient to constitute an adequate consideration for the notes executed to him by the firm, and that these notes in equity afforded evidence of a valid claim upon the partnership assets, as against every one, except creditors other than the partners. It is only contended that Mrs. Tillman ought not to be allowed to occupy a stronger

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position as a creditor of the firm than her husband would have done if he had continued to hold the original notes, and that for that reason payment of her judgment should be postponed in favor of the other creditors. This contention is based upon the theory that Mrs. Tillman is, in legal effect, only the assignee of her husband in the original notes, and hence chargeable with all the infirmities attaching to him as a creditor of the firm. But in our estimation the facts found by the Circuit Court do not sustain that theory. The surrender of the original notes by Tillman, and the execution of new notes by the firm to Mrs. Raben, at his request and with her concurrence, amounted to a novation, and a consequent extinguishment of the original indebtedness to Tillman.

Coming to us through the civil law, three kinds of novation are recognized: First. When the debtor and creditor remain the same, but a new debt takes the place of the old one. Second. Where the debt remains the same, but a new debtor is substituted. Third. Where the debt and debtor remain, but a new creditor is substituted. In each of these cases the extinguishment of the old debt constitutes the consideration for the new obligation, and has always been held to be sufficient. 1 Bouvier Institutes, 310; 2 Abbott Law Dict. 184; Adams *v.* Power, 48 Miss. 450; 1 Addison Con., § 372, *et seq.;* 1 Parsons Con. 217; Clark *v.* Billings, 59 Ind. 508; McClellan *v.* Robe, 93 Ind. 298.

The facts of this case bring it within the third and last class of novations, and requre us to treat Mrs. Tillman as the assignee of a substituted creditor of the firm, and not as the assignee of her husband.

Accepting this view of the character of Mrs. Tillman's claim, it follows that the Circuit Court did not err in placing her upon the same footing with other creditors of the firm.

There was enough that was unusual in the several transactions, which led to the rendition of the judgment in favor of Mrs. Tillman, to attract the attention of other creditors, but there is nothing in the special finding of the facts from which an inference of bad faith can be properly drawn, and as no question is made upon the correctness of the special finding, we must assume that the facts as found by it were fairly established by the evidence.

The judgment is affirmed, with costs.

Filed May 26th, 1884.

CHAPTER X.

ACCORD AND SATISFACTION.

ALLEN *v.* HARRIS.

In the Common Pleas, Michaelmas Term, 1696.

[*Reported in* 1 *Lord Raymond* 122.]

Trover for a waistcoat. The defendant pleads, that the plaintiff, in consideration that the defendant at the special instance of the plaintiff assumed to pay to the plaintiff 20*s.* agreed to discharge the defendant of this *trover*, etc., and lays mutual promises to perform, etc. The planitiff demurs.

Girdler for the defendant.

The old rule was, that an accord with satisfaction ought to be pleaded executed, that the plaintiff might be sure of something for his damages; but an arbitrement may be pleaded without performance, because the parties may have reciprocal remedies. Then it being now settled, that the parties may have actions upon mutual promises, this accord may be pleaded, though not executed, because each party may have his remedy. 2 Jones, 158; Raym. 450; Case *v.* Barber; 2 Jones, 168; Wickham *v.* Taylor. *Sed non allocatur*. For, *per curiam*, if arbitrement be pleaded with mutual promises to perform it, though the party has not performed his part, who brings the action, yet he shall maintain his action; because an arbitrement is like a judgment, and the party may have his remedy upon it. But upon accord no remedy lies. And the books are so numerous, that an accord ought to be executed, that it is now impossible to overthrow all the books. But if it had been a new point, it might be worthy of consideration. Judgment for the plaintiff. See 15 Hen. 6; Accord 1; 3 Cro. 304; Balston *v.* Baxter; Hil. 7 Edw. 4, p. 6; Stile, 245, 252.

BEAUMONT *v.* GREATHEAD.

IN THE COMMON PLEAS, JANUARY 14, 1846.

[*Reported in* 2 *Common Bench Reports* 494.]

DEBT for £110 upon a promissory note for £50, dated April 20th, 1842, payable two months after date, with counts for £30 money lent, and £30 upon an account stated. Damages £50.

Plea, that, after the accruing of the causes of action, and every of them, and before, etc., to wit, on, etc., the defendant paid to the plaintiff, and the plaintiff accepted and received from the defendant, divers sums of money, amounting to all the moneys in the declaration mentioned, in full satisfaction and discharge of the debt and damages in the declaration mentioned—verification.

Replication, traversing the acceptance in satisfaction.

The cause was tried before Tindal, C.J., at the sittings in London after last Trinity Term. The action was brought in the name of Beaumont, as trustee for a loan society, to recover principal and interest alleged to be due upon a joint and several promissory note given to the society by one Green, as principal debtor, and the defendant and one Chittleborough, as sureties.

Green being called in support of the plea, stated, that at various times after the note became due, he had made payments on account thereof, amounting in the whole to £50, to one Boatman, the secretary of the society.

On the part of the plaintiff it was submitted, that, assuming Green's statement to be true, it did not support the plea; that, at all events, the plaintiff was entitled to a verdict for the interest accruing after the maturity of the note; and that the payment ought to have been pleaded according to the fact, as a payment made, not by the defendant, but by Green.

It was left to the jury to say whether or not Green really did pay the £50 to Boatman. A verdict was found for the defendant, with leave to the plaintiff to move to enter a verdict for nominal damages, if the Court should be of opinion that he was entitled to interest.[1]

Byles, in Michaelmas Term last, obtained a rule *nisi* accordingly.

Dowling now showed cause.

Byles (with whom was *R. Miller*) in support of the rule.

[1] No question was raised whether a payment of £50 could satisfy an admitted precise demand of £110, or whether the jury were justified in wholly negativing the damages (not exceeding £50) confessed by the plea.

TINDAL, C.J. The only objection that remains to be considered, is, that the plea was not supported by the evidence. The form of the plea is, that, after the accruing of the causes of action, and every of them, and before the commencement of the suit, the defendant paid to the plaintiff, and the plaintiff then accepted and received of and from the defendant, divers sums of money, amounting to all the moneys in the declaration mentioned, in full satisfaction and discharge of the debt and damages in the declaration mentioned. It is in effect pleaded in full satisfaction of the debt and damages. The jury having given the plaintiff no damages for the detention of the debt, the application made to us on his behalf is, that he may enter a verdict for nominal damages. The question, therefore, is, whether a party who has received the full amount of his actual debt, may still maintain an action for nominal damages. No authority has been cited to show that this nominal damage is such an actually existing damage, that it is not covered by payment of the debt. I think there is no foundation for this application. At all events, if the objection is valid, it is upon the record.

MAULE, J. The question for consideration is, whether, where a sum of money is due upon simple contract, and the creditor is entitled to claim nominal damages for its detention, the debtor is discharged by the creditor's acceptance, before action brought, of the amount of the debt, or whether the former may afterward sue for such nominal damages. I apprehend he cannot. Nominal damages are a mere peg on which to hang costs. If a creditor were to say to his debtor, "You owe me £50 and a nominal sum for the detention thereof;" and the latter were to produce £50 and tender it to the former, saying, "Here is the amount of the debt I owe you, and the nominal damages you claim;" that, I conceive, would be a very good tender. Nominal damages, in fact, mean a sum of money that may be spoken of, but that has no existence in point of quantity; and I think a man may very well pay £50 in satisfaction and discharge of a debt of £50 and of the nominal damages due for its detention. The present plea may, therefore, be taken to have been proved, the jury not being bound to give any interest. The plea is, in effect, a plea of payment of some money, and not of an ascertained and definite sum; and consequently the objection will probably not be found to be upon the record; if it is, the plaintiff may have the benefit of it elsewhere. Then, this being a joint and several promissory note, I think a payment made by one of the makers, enured in discharge of the several liability of each, and

of the joint liability of all ; and, therefore, when the payment was made by Green, it was made, and was accepted by the plaintiff, for each of the other makers of the note, and has been properly pleaded as a payment by the party on whose behalf it was made.

CRESSWELL, J. I am of opinion that the Lord Chief Justice was not bound to tell the jury that they must find some damages, and that the jury were not bound to give interest in the shape of damages. Payment of a smaller sum cannot be pleaded in satisfaction of a debt of larger amount ; but I am not aware that the doctrine has ever been extended to the case of a claim for nominal damages after payment of the full amount of the actual debt.

It may be doubtful whether the question is not upon the record. The plea is, that, after the accruing of the causes of action, and every of them, and before the commencement of the suit, the defendant paid to the plaintiff, and the plaintiff then accepted and received of and from the defendant, divers sums of money, amounting to all the moneys in the declaration mentioned, in full satisfaction and discharge of the debt and damages in the declaration mentioned. If that is to be taken to mean a payment only of the debt mentioned in the declaration, then the objection is upon the record, and our decision, if erroneous, may be set right.

As to the other point, I concur in the opinion expressed by the rest of the Court.

Rule discharged.[1]

FORD *v.* BEECH.

IN THE EXCHEQUER CHAMBER, HILARY TERM, 1848.

[*Reported in* 11 *Queen's Bench* 852.]

THE verdict was entered up as directed in the preceding judgment ; and judgment was entered on the record, with a *consideratum est*, " that the plaintiff take nothing by his said writ, but that he be in mercy, etc., and that the defendant go thereof without day, etc.;" with costs for defendant against plaintiff, and award of execution thereof.

The plaintiff brought error in the Exchequer Chamber ; assigning for error, generally, that judgment ought to have been given for the plaintiff ; and also that judgment ought to have been given for the plaintiff " by reason of the non-per-

[1] The concurring opinion of Erle, J., has been omitted.—ED.

formance by the said William Beech of the promise in the said third count of the said declaration mentioned ; that the said finding of the said jury on the said eighth issue joined between" etc. " amounts to a finding in favor of the said John Ford ; and that judgment ought to have been given accordingly. That the said finding is imperfect, uncertain, and argumentative, and does not dispose of the whole of the said issue ; and that no judgment can be given thereupon, or in respect thereof, or upon the said record and proceedings." That the fifth and sixth pleas " are not, nor is either of them, sufficient to bar the plaintiff from having or maintaining his action as to the causes of action to which those pleas are respectively pleaded. That the said pleas show an accord only, without satisfaction, or with only a partial satisfaction. That the said pleas attempt to set up, as a defence to the causes of action to which they are pleaded, an accord and satisfaction by a stranger to those causes of action. That the said pleas attempt to set up, as an answer to the causes," etc., " the payment of a less sum than the amount which they profess respectively to answer." Joinder.

The case was argued in last Michaelmas vacation, before Wilde, C.J., Maule, and E. V. Williams, JJ., and Parke, Alderson, Rolfe, and Platt, BB.

Pashley for the plaintiff in error.

Unthank, contra.

PARKE, B., in this vacation (February 3d), delivered the judgment of the Court.

This is a writ of error brought to reverse a judgment of her Majesty's Court of Queen's Bench. The declaration is in *assumpsit*, and contained five counts. The first count is upon a promissory note, dated May 28th, 1839, made by the defendant, for the sum of £140 and interest, payable to the plaintiff twelve months after date ; the second count is also on a promissory note, made by the defendant, for the sum of £200, payable with interest to the plaintiff, two years after date. It is unnecessary to advert to the other counts in the declaration, or to the pleadings connected with them. Judgment has been given upon them for the defendant ; and no question arises in respect of that judgment.

The defendant pleaded, to the first count, that he did not make the note therein mentioned, and the like plea to the second count. Upon these pleas issues were joined, and verdicts have been found upon them for the plaintiff. The defendant also pleaded, to both the first and second counts, that, after the making of the notes in those counts respectively men-

tioned, and after the same notes respectively became due, it was agreed, between the plaintiff, the defendant and one Alfred Beech, that the said Alfred Beech should and would, at the request of the plaintiff, pay to the plaintiff, in trust for Elizabeth Beech, the sum of £200 for her own sole use and benefit, or the sum of £25 per annum so long as the sum of £200 should remain unpaid, which sum of £25 should be paid quarterly as therein mentioned ; and that the rights and causes of action of the plaintiff upon and in respect of the said two several notes should be suspended so long as the said A. B. should continue to pay the said sum of £6 5*s.* every quarter ; the payments to commence as therein set forth. The plea proceeds to aver that the said A. B. duly paid the annual sum of £25 quarterly according to the agreement. The plaintiff, in his replication to this plea, traversed the allegation of the payments alleged to have been made by Alfred Beech of the annual sum of £25 ; and a verdict was found for the defendant upon the issue joined upon that traverse. And, judgment having been given by the Court of Queen's Bench for the defendant upon the verdict so found, the present writ of error has been brought to reverse that judgment, upon the ground that, *non obstante veredicto* upon the matters in that plea, judgment ought to have been given for the plaintiff upon both the first and second counts. The plaintiff has brought his writ of error, praying for a reversal of this judgment.

And, upon the argument before us, the learned counsel for the plaintiff has contended that the plea of the defendant to the first and second counts of the declaration is bad, and sets forth no matter which is in law a bar to his right of recovery upon those counts. Upon the part of the plaintiff, the validity of the agreement mentioned in the plea is not denied ; but it has been insisted, in the argument before us, that the agreement does not in point of law operate as a suspension of the plaintiff's right of action or power to sue for the recovery of the notes mentioned in the first and second counts in the declaration ; and that the plea, which sets up the agreement in bar of the present action, is bad, and furnishes no answer to the action, although such agreement may give the defendant a claim to damages by reason of the plaintiff suing in breach of it. The defendant, on the other hand, has contended before us that the legal operation of the agreement is to suspend the plaintiff's right of action so long as A. B. shall continue to make the quarterly payments ; and such agreement has therefore been well pleaded in bar. The question for the decision of the Court is, therefore, what is the legal effect of the agreement

between the parties, set forth in the plea; that is, whether the agreement operates as a legal suspension of the plaintiff's right to sue upon the notes so long as A. B. shall continue to make the quarterly payments; or whether the effect of the agreement is limited to the rendering the plaintiff liable to an action for damages in the event of his suing contrary to its terms.

In adjudicating upon the construction and effect in law of this agreement, the common and universal principle ought to be applied; namely, that it ought to receive that construction which its language will admit, and which will best effectuate the intention of the parties, to be collected from the whole of the agreement, and that greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent. And applying this rule, the question is, what sense and meaning must be given to the word "suspended," used by the parties. It is quite clear that it was not the intention of the parties that the agreement should have the effect, from the moment of its being signed, of utterly and forever and in all events extinguishing the plaintiff's claim and demand upon the notes, and of ever maintaining an action for the recovery; or, in other words, that it should operate as a release of the money due upon them. This is plain from the words which import that the plaintiff might sue upon the notes when A. B. should cease to make the quarterly payments mentioned in the agreement.

It is a very old and well-established principle of law, that the right to bring a personal action, once existing and by act of the party suspended forever so short a time, is extinguished and discharged, and can never revive. It is said in Platt *v.* The Sheriffs of London:[1] "And if a personal thing is once in suspense, or the person of a man once discharged for a personal thing it is a discharge forever." And in Lord North *v.* Butts[2] it is said: "A thing personal or suspended, or action personal suspended for an hour, is extinct and gone forever, when it is by the act and consent of the party himself who has the thing suspended." And in Woodward *v.* Lord Darcy[3] it is said: "For a personal action once suspended by the act or agreement of the party is always extinct and then if a personal thing cannot be had but by action, if the action is extinguished, the thing itself is extinguished." The principle thus laid down is repeated thoughout the text-books of authority, and recognized and applied through a long course of decision. And in Cheetham *v.* Ward[4] it is said by Eyre, C.J., that the principle

[1] Plowd. 35, 36.
[2] 2 Dyer, 139 *b*. 140 *a*. (39).
[3] Plowd. 184.
[4] 1 Bos. & P. 630, 633.

is "now acknowledged, that where a personal action is once suspended by the voluntary act of the party entitled to it, it is forever gone and discharged."

To construe the agreement, therefore, to operate as a legal suspension or bar of the plaintiff's right to sue until the quarterly payments should cease, would have the effect of precluding him from ever suing at all, and of giving to the agreement the effect of an immediate release of the demand upon the notes, and an extinction of the debt. It follows that giving such meaning and effect to the word suspended, used in the agreement, would be contrary to the intention of the parties: and it is a well-approved rule of law that, where parties have used language which admits of two constructions, the one contrary to the apparent general intent and the other consistent with it, the law assumes the latter to be the true construction.

A few authorities will suffice in support of this principle. In commenting upon Littleton, § 560—where Littleton says, "If there be lord and tenant, and the tenant grant the tenements to a man for term of his life, the remainder to another in fee, if the lord grant the services to the tenant for life in fee," "the services are put in suspense during his life. But the heirs of the tenant for life shall have the services after his decease." Lord Coke, in 313a, says: "It is to be observed, that albeit a grant, as hath been said, may enure by way of release, and a release to the tenant for life doth work an absolute extinguishment, whereof he in the remainder shall take benefit, yet the law shall never make any construction against the purport of the grant to the prejudice of any, or against the meaning of the parties as here it should; for if by construction it should enure to a release, the heirs of the tenant for life should be disherited of the rent; and therefore Littleton here saith, that the heirs of the grantee shall have the seigniory after his death." In the present case, if the agreement operates as a release by reason of a suspension of the right of action by the act of the party, it must be by a consequence of law, inasmuch as there is no express release; and in Co. Litt., 264b, it is said: "a release in law shall be expounded more favorable, according to the intent and meaning of the parties, than a release in deed, which is the act of the party, and shall be taken most strongly against himself." The general rules of law for the construction of instruments are clearly laid down by Willes, C.J., in Parkhurst *v.* Smith, lessee of Dormer,[1] and which is to the effect that greater regard is to be had to the intention than to the precise words; and this rule

[1] Willes, 327, 332.

is said to have the authority of Littleton, Plowden, Coke, Hobart, and Finch. This principle is recognized and adopted by Gibbs, C.J., in Hutton *v.* Eyre ;[1] and it is also stated and applied by Dallas, C.J., and various authorities referred to, in Solly *v.* Forbes ;[2] wherein he states, as the result of modern authority, that the Courts look "rather to the intention of the parties than to the strict letter ; not suffering the latter to defeat the former ;" and he observes that, if a deed can "operate two ways, one consistent with the intent and the other repugnant to it, Courts will be ever astute so to construe it as to give effect to the intent," regard being had to "the entire deed ;" and remarks upon the fallacy of assuming that, "wherever the word release is made use of, it must operate absolutely and unconditionally," though followed by words of qualification.

Applying the rules of construction before referred to to the present case, and in order best to effectuate the intention of the parties, it is necessary to construe the agreement to mean that the plaintiff agreed to forbear his suit until the quarterly payment should cease to be made ; and that the effect of such agreement on his part was, not to suspend his right of action in the meantime, but to subject him to an action for damages in the event of his suing contrary to his agreement.

The general doctrine of suspension of personal actions appears to be applicable to case where persons have, by their own acts, placed themselves in circumstances incompatible with the application of the ordinary legal remedies ; the cases generally referred to in the books being where the party to pay and to receive have become identical, or where the same person was necessary to be joined at once both as plaintiff and defendant, which by law cannot be ; such as a creditor making his debtor his executor, or debtor making his creditor executor, or debtor and creditor marrying, or similar cases of incapacity to sue ; as to which the authorities are numerous ; see Co. Litt. 264b, also Butler's note *ib.* (209), Woodward *v.* Lord Darcy,[3] Sir J. Nedham's Case,[4] Dorchester *v.* Webb,[5] Wankford *v.* Wankford,[6] Freakley *v.* Fox,[7] 2 Williams on Executors, 1124.[8]

The only case in which a covenant or promise not to sue is held to be pleadable as a bar, or to operate as a suspension,

[1] 6 Taunt. 289, 295, 6 ; S. C. 1 Marsh. 603, 607, 8.
[2] 2 Br. & B. 38, 48.
[3] Plowd. 184.
[4] 8 Rep. 135a.
[5] Cro. Car. 372.
[6] 1 Salk. 299.
[7] 9 B. & C. 130.
[8] Ed. 4

and by consequence a release or extinguishment of the right of action, is where the covenant or promise not to sue is general, not to sue at any time. In such cases, in order to avoid circuity of action, the covenants may be pleaded in bar as a release, note (1) to Fowell *v.* Forrest,[1] for the reason assigned, that the damages to be recovered in an action brought for suing contrary to the covenant would be equal to the debt (Smith *v.* Mapleback,)[2] or sum to be recovered in the action agreed to be foreborne. Accordingly, in Deux *v.* Jefferies,[3] in debt on obligation, the defendant pleads that the plaintiff covenanted that he would not sue before Michaelmas ; it was resolved, upon demurrer, for the plaintiff, for that it was only a covenant not to sue, and should not enure as a release, nor could be pleaded in bar, but the party was put to his writ of covenant, if sued before the time. "But if it had been a covenant that he would not sue it at all, there peradventure it might enure as a release, and to be pleaded in bar, but not here ; for it never was the intent of the parties to make it a release." And there are other authorities to the like effect. The agreement in the present case, though not under seal, being founded upon a good consideration, may be argued to be equivalent in effect to a covenant, but cannot have a greater effect ; and, in the modern case of Thimbleby *v.* Barron,[4] it was held that a covenant not to sue for a limited time for a simple contract debt could not be pleaded in bar to an action for such debt. In that case the plaintiff had covenanted that he would not, before the expiration of ten years, demand or compel payment of certain sums of money, nor would take any means or proceedings for obtaining possession or receipt of the same. Lord Abinger, C.B., said : "The breach of the agreement to forbear suing renders the party liable in damages, but it is not pleadable in bar :" and Parke, B., said : "The books are full of authorities" against the defendant, and referred[5] to Ayloffe *v.* Scrimpshire :[6] judgment for plaintiff. In 1 Roll. Abr. 939, Tit. Extinguishment (L), plea 2, it is said that, if the obligee covenant not to sue the obligor before such a day, and, if he do, that the obligor shall plead this as an acquittance, and that the obligation shall be void and of none effect, this is a suspension of the debt, and by consequence a release. It must be observed that in that case it was expressly covenanted that, in the event of the covenantor suing upon the obligation contrary to his covenant, the obligation should be void, and that the

[1] 2 Wms. Saund. 47 gg.
[2] 1 T. R. 441, 446.
[3] Cro. Eliz. 352.
[4] 3 M. & W. 210.
[5] *Ibid.* 215.
[6] Carth. 63 ; S. C. 1 Show. 46.

obligor or covenantor should plead the covenant as an acquittance, which, by consequence, was a release ; the covenant in that case therefore went much beyond a mere covenant not to sue.[1]

By holding the plea in question a valid bar, injustice would be done to the plaintiff, who would lose his demand upon the notes, contrary to the intention of the parties ; but, by construing the agreement not to operate as a suspension of the plaintiff's right of action upon the notes, but as giving a remedy to the defendant by a cross action to recover damages to the extent of the injury sustained by the defendant by the plaintiff suing in breach of the agreement, no injustice is done to the defendant.

Nor is such a construction inconsistent with the class of authorities in which matters were allowed to be pleaded in bar in order to avoid circuity of action, because such decisions are limited to cases in which, from the nature of them, the damages to be recovered must be supposed to be equal in both actions ; Smith *v.* Mapleback,[2] which does not apply to the present instance, as the damages to which the defendant could be entitled as against the plaintiff, by reason of his suing upon the notes before a discontinuance of the quarterly payment, can in no view be assumed to be equal to the plaintiff's demand. Neither is the decision in this case inconsistent with the several cases in which it has been held that a party accepting a negotiable security payable in future for and on account of an antecedent demand cannot, until after such negotiable security has become due and been dishonored, sue for such antecedent demand ; because, independently of the consideration of how far the acceptance of such negotiable security may be deemed payment for the time, all such decisions seem to be grounded upon the peculiar nature of the negotiable instruments, and are deemed to be necessary exceptions to the general rules of law, in favor of the law merchant ; see note (*c*) to Holdipp *v.* Otway.[3]

The case of Stracy *v.* The Bank of England[4] was cited, on the defendant's behalf, as an authority to the effect that a right to bring a personal action may be suspended by agreement, without operating as a release or extinguishment. But, upon examination, it will be found probably not to be an authority bearing upon the point. The action was brought to recover damages for an alleged breach of a public duty in not making a transfer, upon request, of certain stock, to which the plain-

[1] See also the conclusion of Ayloffe *v.* Scrimpshire, Carth. 64.
[2] 1 T. R. 441, 446. [3] 2 Wms. Saund. 103b. (6th ed.). [4] 6 Bing. 754.

tiffs were entitled ; the defendants insisted that the plaintiffs had for good consideration agreed not to make such request until they had themselves done certain acts ; and alleged that the plaintiffs, contrary to their agreement, made the request, for the non-compliance with which they brought their action, before they had done those acts : the defendants therefore contended that such non-compliance was no breach of duty on their part. There was no right of action suspended by the agreement ; as it is clear from the case that no request had ever been made to the Bank to transfer the stock, and no means had ever been given to enable the Bank to do so, no name of a transferee having been given at the time when the agreement was made, nor for a long time afterward : consequently, the only right of action the plaintiffs ever asserted was a right founded upon a request made long after the agreement. The decision, therefore, was, not that any existing right of action was suspended by the agreement, but that the plaintiff suspended his right to call upon the defendants to make a transfer until after he had done the acts mentioned in the agreement. And, although the expression of suspending an action was used, perhaps inaccurately, yet it is plain that they referred to the right to call for the transfer of the stock, and to that only. At all events, as a decision upon the point for which the case was cited, it could not be supported, as it would be inconsistent with an undoubted principle of law and an undeviating course of authority.

In the result, we are of opinion that the plea in question is bad in substance, and that the judgment which has been pronounced upon it in favor of the defendant must be reversed, and a judgment entered for the plaintiff, *non obstante veredicto*, upon the confession and insufficient avoidance in the plea.

Judgment accordingly.

OTTO KROMER, Respondent, *v.* ANTON HEIM, Appellant.

In the Court of Appeals of New York, January 21, 1879.

[*Reported in* 75 *New York Reports* 574.]

Appeal from order of the General Term of the Superior Court of the city of New York, affirming an order of Special Term denying a motion on the part of defendant to set aside an execution issued upon judgment herein, and to have the judgment satisfied of record.

On June 24th, 1876, plaintiff obtained a judgment herein for $4334.08. On July 26th, 1876, and pending a stay of execution, plaintiff's attorney executed and delivered to defendant a written stipulation, in and by which plaintiff agreed to accept in settlement of the judgment, if paid within a year, $3000 in cash and an assignment of defendant's interest in a certain patent right and of the assets of such patent business, or to accept $1000 in cash, $250 down and the balance in instalments, and merchandise to be delivered in amounts stated, sufficient, with the cash payments, to reduce the judgment to $1000, and an assignment of said patent interests. Defendant paid the $250 down, and made the other cash payments and deliveries of merchandise, as specified in the second alternative of the stipulation, until the judgment was reduced to less than $1000, all of which payments were received by plaintiff without objection. Defendant then executed and tendered to plaintiff an assignment of the patent interests as required, which plaintiff declined to accept, but issued an execution to collect the balance of the judgment.

D. M. Porter for appellant.

J. W. Feeter for respondent.

ANDREWS, J. "Accord," says Sir Wm. Blackstone, "is a satisfaction agreed upon between the party injuring and the party injured; which, when performed, is a bar to all actions upon this account." 3 Bl. Com. 15. An accord executory without performance accepted is no bar; and tender of performance is insufficient. Bac. Abr. Tit. Accord and Satisfaction, C. So also accord with part execution cannot be pleaded in satisfaction. The accord must be completely executed, to sustain a plea of accord and satisfaction. Bac. Abr. Accord and Satisfaction, A; Cock *v.* Honeychurch, T. Ray. 203; Allen *v.* Harris, 1 Ld. Ray. 122; Lynn *v.* Bruce, 2 H. Bl. 317. In Peytoe's Case, 9 Co. 79, it is said, "and every accord ought to be full, perfect and complete; for if divers things are to be done and performed by the accord, the performance of part is not sufficient, but all ought to be performed." The rule that a promise to do another thing is not a satisfaction, is subject to the qualification that where the parties agree that the new promise shall itself be a satisfaction of the prior debt or duty, and the new agreement is based upon a good consideration, and is accepted in satisfaction, then it operates as such, and bars the action. Evans *v.* Powis, 1 Exch. 601; Kinsler *v.* Pope, 5 Strobhart, 126; Pars. on Cont. 683, note.

An exception to the general rule on this subject has been allowed in cases of composition deeds, or agreements between

a debtor and his creditors ; and they have been held, upon grounds peculiar to that class of instruments, to bar an action by a separate creditor, who had signed the composition to recover his debt, although the composition agreement was still executory. Good *v.* Cheeseman, 2 Barn. & Ad. 335 ; Bayley *v.* Homan, 3 Bing. (N. C.), 915. The doctrine which has sometimes been asserted that mutual promises which give a right of action may operate and are good, as an accord and satisfaction of a prior obligation, must, in this State, be taken with the qualification that the intent was to accept the new promise, as a satisfaction of the prior obligation. Where the performance of the new promise was the thing to be received in satisfaction, then, until performance, there is not complete accord ; and the original obligation remains in force. Russell *v.* Lytle, 6 Wend. 390 ; Daniels *v.* Hallenbeck, 19 Wend. 408 ; Hawley *v.* Foote, 19 Wend. 516 ; The Brooklyn Bank *v.* DeGrauw, 23 Wend. 342 ; Tilton *v.* Alcott, 16 Barb. 598.

Applying the well-settled principles governing the subject of accords to this case, the claim that the plaintiff's judgment is satisfied cannot be maintained. There is no ground to infer that the agreement of July 26th, 1876, was intended by the parties to be or was accepted as a substitute for or satisfaction of the plaintiff's judgment. It was, in effect, a proposition on the part of the plaintiff, in the alternative, to accept $3000 in cash, if paid within one year, and the assignment of the patent and avails of the patent business, in full of the judgment of $4334.08, or to accept $1000 in cash, in instalments, and the balance in merchandise, until the judgment should be reduced to $1000 ; and for that balance to accept the assignment of the patent interests.

The defendant had the election between the alternatives presented by the plaintiff. He elected the latter, and paid the $1000, and supplied the merchandise, until the debt was reduced to $1000, and then tendered the assignment of the patent interests, which the plaintiff refused to accept.

The judgment clearly was to remain in force until the satisfaction under the new agreement was complete. It is the case of an accord partly executed. So far as the plaintiff accepted performance, his claim was extinguished. So far as it was unexecuted, the judgment remained in full force ; and however indefensible in morals it may be for the plaintiff to refuse to abide by the agreement in respect to the patent interests, he was under no legal obligation to accept the assignment tendered ; and he had the legal right to enforce the judgment for the balance remaining unpaid.

It is clear that the right to supply the merchandise was for the benefit of the defendant. The plaintiff gave him the option to pay $3000 in cash, and assign the patent interests, or to pay $3334.08 in merchandise and assign the patent interests. The merchandise was to be furnished on "as favorable terms as would be allowed by Hoyt & Co., or New York rates for cash sales." It gave the plaintiff no benefit beyond what he would derive by any purchase in the open market of the same kind of goods. It is quite clear that the defendant preferred to pay $3334.08 in merchandise to paying $3000 in cash.

We think that no distinction arises upon the circumstances to take the case out of the general rule, that an unexecuted accord cannot be treated as a satisfaction.

The order should be affirmed.

All concur.

Order affirmed.

DAVID P. MOREHOUSE, AS RECEIVER, ETC., RESPONDENT, *v.* THE SECOND NATIONAL BANK OF OSWEGO, APPELLANT.

IN THE COURT OF APPEALS OF NEW YORK, MARCH 24, 1885.

[*Reported in* 98 *New York Reports* 503.]

APPEAL from judgment of the General Term of the Supreme Court, in the Fourth Judicial Department, entered upon an order made October 19th, 1883, which affirmed a judgment in favor of plaintiff, entered upon the report of a referee. Reported below, 30 Hun, 628.

This action was brought by the plaintiff as receiver of one McRae, appointed in proceedings supplementary to execution, to recover under the provisions of § 5198 of the Revised Statutes of the United States, twice the amount of excessive interest alleged to have been taken and received by the defendant from McRae, prior to November 1st, 1876, on loans and discounts made by the bank to and for McRae the amount of which excessive interest, as found by the referee, was $946.75. The defendant, among other things, set up in his answer as a defence, an alleged agreement between McRae and the bank, made on or about November 1st, 1876. This agreement was found by the referee as follows: "that on or about the first day of November, 1876, an oral agreement was made between McRae and the president and vice-president of the defendant, for and on behalf of the bank, whereby McRae agreed to settle

and discharge all claims and causes of action in his favor against the bank, for or on account of McRae, having paid more than seven per cent., upon loans and discounts, and that all such matters be applied in payment of that part of his indebtedness to the bank, not collected by the bank from any other source, and that he would not sue or allow any other suit to be brought against the bank for or on account of such illegal interest paid to the bank, and in consideration thereof the said officers of the bank, for and in behalf of the bank, agreed that the bank would satisfy so much of the indebtedness of McRae to the bank as remained after applying all other collections available to the bank, or would consent as a creditor to his discharge in bankruptcy, as McRae might request." When this agreement was made McRae was indebted to the bank for loans and discounts to a large amount, and on June 26th, 1879, after applying all collections made by the bank, there was then due from McRae on the indebtedness existing November 1st, 1876, without taking into account the excessive interest paid, the sum of $7847.73, no part of which has since been paid. McRae became insolvent in 1876.

The referee overruled the defence stated and directed judgment for the plaintiff for $1893.50, double the amount of the unlawful interest.

Other facts are stated in the opinion.

S. C. Huntington for appellant.

B. B. Burt for respondent.

ANDREWS, J. The agreement of November 1st, 1876, was, we think, a good defence to the action. The General Term sustained the finding of the referee, upon the ground that the agreement, when made, was executory, that there was no subsequent execution of its provisions, and that the case was within the general principle that an accord without satisfaction is no bar to a suit upon the original cause of action. It is not, however, universally true that a cause of action on contract, or for tort, may not be extinguished by an agreement between the parties, although the agreement which is the consideration for the satisfaction is executory. If the subsequent agreement is accepted in satisfaction, and this appears expressly or by implication, the original cause of action is merged and extinguished. Kromer *v.* Heim, 75 N. Y. 574, and cases cited. It is plain also, that if one having a debt or claim against another satisfies or releases it in consideration of an executory promise by the party owing the debt or duty, he cannot afterward enforce his original cause of action upon a mere failure by the other party to perform his promise, "for he has a remedy to compel per-

formance." The agreement found by the referee from its very nature, operated as an immediate discharge and satisfaction of the claim of McRae against the bank. The mutual promises of the parties were not dependent, so as to render the discharge of the claim of McRae conditional upon full performance by the bank of its promise. He agreed to settle and discharge his claim against the bank, and to apply the same in payment *pro tanto* of his indebtedness, and further that he would not sue, or permit any suit to be brought against the bank thereon. The bank, on its part, agreed in substance to make the application, and also to satisfy the remaining indebtedness, or consent to McRae's discharge in bankruptcy as he should elect. The agreement to set off the mutual debts became executed *eo instanti*. This point was expressly adjudged in Davis *v.* Spencer, 24 N. Y. 386. The law, acting upon the agreement itself, made the application without further act of the parties. It is true that the exact amounts of the mutual debts do not appear to have been ascertained at the time, but they were capable of ascertainment. In Davis *v.* Spencer, the account on one side was, as may be inferred, unliquidated, but this did not stand in the way of the application of the principle decided. The agreement not to sue, or to permit suit to be brought, also operated as a present release and discharge of McRae's cause of action. Chandler *v.* Herrick, 19 Johns. 129; Addison on Cont. 270. The agreement was not a technical release, but it operated as such, and the fact that it was not under seal, or was oral, does not affect the application of the principle. Foster *v.* Purdy, 5 Metc. 442; Davis *v.* Spencer, *supra*; Farmers' Bank *v.* Blair, 44 Barb. 641. The only part of the agreement which was executory was the undertaking on the part of the defendant to satisfy the remaining indebtedness of McRae, or to consent to his discharge in bankruptcy at his option. The performance of this part of the agreement depended upon a prior request or election of McRae. If the bank on request should refuse performance, McRae has a remedy in an action for damages, or he can await proceedings by the bank to enforce the balance of the debt, and defend himself under the agreement. But his original claim against the bank was merged and satisfied. The claim that the bank took proceedings subsequent to the agreement, inconsistent with it, is irrelevant here, assuming that it is well founded. It was a proper matter for the consideration of the referee, bearing upon the point whether the agreement claimed by the defendant was made; but the agreement being established, its violation by the defendant would not affect its legal operation.

There is no ground for saying that the agreement was released or discharged, or in any way became inoperative. We are of opinion that upon the agreement found, the defendant was entitled to judgment. This renders it unnecessary to consider the other questions.

The judgment should be reversed.

All concur, except Ruger, C.J., not voting.

Judgment reversed.

STEEDS AND ANOTHER *v.* STEEDS AND ANOTHER.

IN THE SUPREME COURT OF JUDICATURE, FEBRUARY 6, 1889.

[*Reported in Law Reports*, 22 *Queen's Bench Division*, 537.]

APPEAL from chambers.

The plaintiffs sued the defendants upon a specially endorsed writ to recover £315 18*s.* 2*d.*, for principal and interest due upon a common money bond given by the defendants to the plaintiffs in the year 1869, and conditioned for the payment on demand of £300 with interest. The defendant John Steeds pleaded that in 1872 he, in full satisfaction and discharge of all his liability and that of his co-defendant under the bond, handed over and transferred to one of the plaintiffs certain stock and goods which the said plaintiff accepted in full satisfaction and discharge of the bond. The defence of the defendant Beauchamp was that the accord and satisfaction pleaded by Steeds released him, as surety, from all liability under the bond. The plaintiffs took out a summons under Order XXV., r. 4, to have the whole of the defence struck out on the ground that it disclosed no reasonable answer or defence to the claim. The summons having been dismissed by the master and the judge in chambers, the plaintiffs appealed.

J. G. Wood for the plaintiffs. Accord and satisfaction is not a good defence, either at law or in equity, to an action on a common money bond, where the liability arises upon the specialty itself and not upon some subsequent default. The dictum in Bullen and Leake's Precedents of Pleadings (4th ed.), Vol. II., at p. 89, that the common law doctrine that a contract by specialty could only be discharged by writing also under seal did not prevail in equity, and that a parol release or rescission of a specialty contract might be effectual in equity if founded upon a consideration, is inaccurate, and the cases there cited do not bear out the proposition. In cases like the

present equity follows the law, unless something can be shown which would make it inequitable in the particular case to enforce the liability at common law.

Secondly, assuming accord and satisfaction to be a good equitable defence in the case of a sole obligee, it is not a defence in the case of one of two obligees, for payment by way of accord and satisfaction to one of two joint creditors is not a discharge in equity. In Matson *v.* Dennis,[1] where a mortgage contained a covenant to pay the money and also a charge upon the land in favor of two joint creditors, payment to one was held to operate as a discharge of the covenant but not of the charge on the land. The reason of the rule is that where money is advanced by two persons to a third they will be looked upon in equity as tenants in common and not as joint tenants of the debt and of any security given for it.

E. U. Bullen for the defendants.

J. G. Wood in reply.

The judgment of the Court (Huddleston, B., and Wills, J.) was read by

WILLS, J. The plaintiffs in this case sue for a sum of money alleged to be due for principal and interest on a bond made in their favor by the two defendants.

One of the defendants pleads that he delivered to one of the plaintiffs certain stock and goods which were given by him and accepted by the said plaintiff in satisfaction and discharge of the money due upon the bond. The other defendant pleads that he executed the bond as surety and was discharged by the transaction set up by the first defendant.

The plaintiffs apply to have this defence struck out, as being no answer to their claim. The same question arises as to both defendants, and is shortly whether in respect of a bond given by C. to A. and B., accord and satisfaction made by C. to A. after the cause of action had arisen, and accepted by A., is an answer to the claim of A. and B.

On behalf of the plaintiffs two objections are raised. First, that in respect of a specialty debt, accord and satisfaction of the cause of action by the person or persons liable is no more an answer to the action in equity than it is at law. Second, that even if it would be so, were the bond made in favor of A. alone, accord and satisfaction with A. is no answer in equity to the action by A. and B.

It is clear that at law accord and satisfaction of a debt due upon a bond is no bar to the action. This is, however, purely the result of a technicality absolutely devoid of any particle of

[1] 10 Jur. (N. S.) 461; 12 W. R. 962.

merits or justice, viz., that a contract under seal cannot be got rid of except by performance or by a contract also under seal; so that supposing it had really been the case that in satisfaction of an overdue bond for £1000 the person liable had given property worth £2000, which had been accepted in discharge of the obligation, still at law the obligee of the bond might recover his £1000 without returning the property.

One would have thought that if the Courts of Equity ever interfered at all to prevent a man from enforcing an unconscientious and dishonest demand to which there was no answer at law, they would perpetually restrain an action brought under the circumstances described. Mr. Wood, however, who is an equity lawyer, contended before us that this was a case in which equity would follow the law, and would refuse to interfere, and he laid great stress upon a case of Webb *v.* Hewitt,[1] which he said established that proposition. We are glad to say that we are unable to agree with him, and that we think he has done injustice to a system of which one recommendation has been supposed to be that it was, sometimes at all events, competent to correct some of the worst and most odious technicalities of the common law. The case cited appears to us to lead to the opposite conclusion to that contended for, and we think it perfectly clear that the ratio *decidendi* of the learned Vice-Chancellor was, that when the plaintiff had accepted money's worth in place of money in discharge of the bond, the debt in equity was gone and there was an end of it.

Upon the first point, therefore, we are against Mr. Wood, and have no doubt that if payment to one of the plaintiffs would have been an answer, the delivery to him and acceptance by him of goods in satisfaction of the debt would be equally an answer.

But Mr. Wood is, we think, right in saying that, as the defence is an equitable one, it is equally necessary to establish that payment by C., the obligor, to A., the latter being joint obligee with B., would in equity be an answer to the claim by A. and B. on the bond. We cannot follow Mr. Bullen's argument that as equity would treat the satisfaction as equivalent to payment, having got so far, he is at liberty to discard any further reference to equity, and say that as at common law payment to or release by A. would prevent A. and B. from suing, he is now in a position to treat A. as having been paid, and say that as this is a common law action there is the equivalent to a common law defence. If he is obliged to resort to equity for his defence, he must take the equitable principles

[1] 3 K. & J. 438.

applicable to the circumstances in their entirety ; and we must therefore inquire what is the rule in equity with respect to payment to one of two co-obligees or co-creditors.

The reason why the defence is a good one at law is that the two creditors are treated as having a joint interest in the debt, with its incident of survivorship, and the satisfaction to one of the parties of a joint demand due to himself and others puts an end to the joint demand, and he cannot afterward, by joining the other parties with him as plaintiffs, recover the debt ; nor can a right of action be supposed to exist which, if it existed, might survive to the very person who had already received full value. Wallace *v.* Kelsall.[1]

In equity, however, it would appear as if the general rule with regard to money lent by two persons to a third was that they will *primâ facie* be regarded as tenants in common, and not as joint tenants, both of the debt and of any security held for it. Petty *v.* Styward ;[2] Rigden *v.* Vallier,[3] cited in the notes to Lake *v.* Craddock.[4] "Though they take a joint security," says Lord Alvanley, M.R., "each means to lend his own money and to take back his own." Morley *v.* Bird.[5] Where a mortgage debt has been paid to one of the mortgagees, accordingly, it was held that the land was not discharged, and that the concurrence of the other mortgagees was necessary to make a good title. Matson *v.* Dennis.[6] This is on the ground that the debt is held by the two in common and not jointly, and the principle seems to us equally applicable whether the debt is secured by a mortgage or is merely the subject of a personal contract. The principal right of a mortgagee is to the money, the estate in the land is only an accessory to that right.

It is obvious, however, that this proposition cannot be put higher than a presumption capable of being rebutted. If the money, supposing it to have been lent, were trust money, the presumption of a tenancy in common on the part of the two trustees could not, as it seems to us, arise. Survivorship is essential for the purposes of trusts, and so there may be a variety of circumstances which may settle the question either one way or the other. In the present case we do not even know whether the bond was for money lent, or what was the groundwork of the obligation, and it is clear that if the presumption is that the interest in this obligation belonged in equal portions in severalty to the two plaintiffs, the plaintiff who was settled

[1] 7 M. & W. 264.
[2] Eq. Ca. Abr. 290.
[3] 2 Ves. Sen. 258.
[4] 1 White & Tudor, 5th ed. 208.
[5] 3 Ves. 631.
[6] 10 Jur. (N.S.) 461 ; 12 W. R. 926.

with by the accord and satisfaction has been paid his half, at all events, and it cannot be recovered again in this action.

We think, therefore, that we cannot strike out this defence as we are invited to do. It seems to us that it must be good for a part of the claim at all events. But we think the statement of defence defective, and that Mr. Bullen ought to amend by a further statement of the material facts, and our order is that the statement of defence be amended accordingly, and if that be not done within ten days, the plaintiff be at liberty to sign judgment for half the amount claimed. We trust that upon the amended pleading being delivered the plaintiffs will, if possible, meet it by any necessary addition to or correction of the facts alleged, and not repeat a motion of this kind, which asks the Court to do what is to the last degree unsatisfactory, give judgment for a defect of pleading and in ignorance of all the facts which ought to be known before the rights of the parties are definitely adjudicated upon. Both parties are partly responsible for the present motion, and the costs of this appeal will be costs in the cause.

Order accordingly.

DAY AND ANOTHER *v.* McLEA AND ANOTHER.

IN THE COURT OF APPEAL, MARCH 18, 1889.

[*Reported in Law Reports*, 22 *Queen's Bench Division*, 610.]

APPEAL from the judgment of Charles, J., at the trial of the action without a jury.

The action was brought to recover damages for breach of contract. The defence was that the plaintiffs had agreed to accept and had accepted £102 18*s.* 6*d.*, in full satisfaction of all demands in respect of the breach. It appeared that, after the breach, the plaintiffs made a claim on the defendants, who thereupon sent them a check for £102 18*s.* 6*d.*, being less than the amount claimed, stating that it was "in full of all demands," and enclosing a receipt in that form for signature by the plaintiffs. The plaintiffs wrote in reply that they took the check on account, and had placed it to the defendants' credit, at the same time enclosing a receipt on account, and asking for a check for the balance of the claim. In answer to this letter the defendants wrote stating that the payment was made in full of all demands, and asking for a receipt in full. It was contended on behalf of the defendants that the keeping of the check by the plaintiffs was in law an accord and satisfaction of the claim.

Charles, J., held that there was no accord and satisfaction, and gave judgment for the plaintiffs.

The defendants appealed.

Firminger for the defendants.

Bosanquet, Q.C., and *Stubbins* for the plaintiffs.

Lord ESHER, M.R. This was an action to recover damages for breach of contract. The plaintiffs were claiming a considerable sum as damages, and, before action brought, the defendants sent them a check for £102 18*s.* 6*d.*, being less than the amount claimed, with a form of receipt, to be signed by the plaintiffs, that this sum was accepted in full satisfaction of the claim. The plaintiffs kept the check but refused to accept it in satisfaction, and sent a receipt on account. It was contended that the keeping of the check so sent was, as a matter of law, an accord and satisfaction of the claim, and that the plaintiffs were bound either to take it in full satisfaction or to return it. The contention, therefore, was that the plaintiffs having kept the check must be taken in law to have accepted it in satisfaction. Upon the other side it was contended that the keeping of the check could only be evidence of accord and satisfaction, and that whether or not it was taken in satisfaction was a question of fact to be determined according to the circumstances of the case. That argument raises the question whether the fact of keeping a check sent in satisfaction of a claim for a larger amount is in law conclusive that there has been an accord and satisfaction. It is said that that inference of law must be drawn even though the person receiving the check never intends to take it in satisfaction and says so at the time he receives it. All I can say is that if that is a conclusive inference it would be one contrary to the truth. I object to all such inferences of law. This very question, however, came before this Court in Miller *v.* Davies.[1] In that case the action was upon a solicitor's bill of costs for £50, and there was a plea of accord and satisfaction. Before action the defendant sent the paintiff a check for £25, with a letter stating that, in order to put an end to the matter, he sent the check for £25, on the terms that the plaintiff would receive it in settlement. The plaintiff kept the check and cashed it, and wrote to the defendant that he declined to accept it in settlement and that he required a check for the balance. The defendant thereupon wrote in reply requesting the plaintiff to return the check if he would not accept it in satisfaction. The jury found that there was no accord and satisfaction. It was contended there as in the present case that the fact of the plaintiff keeping the check was

[1] Not reported.

conclusive in law that he had taken it in accord and satisfaction of the claim, inasmuch as it had been sent in satisfaction and the plaintiff was bound either to keep it upon the terms on which it had been sent or to return it. This Court, however, held that the fact of keeping the check was not conclusive in law, that the question was one of fact, and that the jury having found that there was no accord and satisfaction the Court would not interfere. That case is clearly in point. The question, therefore, whether there has been an accord and satisfaction is one of fact. It was for the judge to decide whether the plaintiffs agreed to take £102 18*s.* 6*d.* in satisfaction of their claim. The learned judge has found that fact in favor of the plaintiffs, and consequently this appeal must be dismissed.

BOWEN, L.J. I am of the same opinion. It seems to me, as a matter of principle as well as of authority, that the question whether there is an accord and satisfaction must be one of fact. If a person sends a sum of money on the terms that it is to be taken, if at all, in satisfaction of a larger claim ; and if the money is kept, it is a question of fact as to the terms upon which it is so kept. Accord and satisfaction imply an agreement to take the money in satisfaction of the claim in respect of which it is sent. If accord is a question of agreement, there must be either two minds agreeing or one of the two persons acting in such a way as to induce the other to think that the money is taken in satisfaction of the claim, and to cause him to act upon that view. In either case it is a question of fact. Therefore, upon principle, as well as upon the authority of the case of Miller *v.* Davies,[1] which has been brought to our notice, the judgment of Charles, J., must be affirmed.

FRY, L.J. I also agree that the case of Miller *v.* Davies[2] is conclusive upon the point of law.

Appeal dismissed.

[1] Not reported

[2] Not reported.

J. FELIX NASSOIY, RESPONDENT, *v.* DAVID H. TOMLINSON ET AL., APPELLANTS.

IN THE COURT OF APPEALS OF NEW YORK, JANUARY 28, 1896.

[*Reported in* 148 *New York Reports* 326.]

APPEAL from judgment of the General Term of the Supreme Court in the Fifth Judicial Department, entered upon an order made January 18th, 1894, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed an order denying a motion for a new trial.

The plaintiff sued to recover the sum of $1200, which he claimed as a balance due him from the defendants for commissions on the sale of real estate owned by them, upon the agreed basis of five per cent. on the purchase-price, which was $30,000. The defendants claimed that the agreement was that they should pay the plaintiff whatever they thought was right, and that the debt had been discharged by an accord and satisfaction.

The facts, so far as material, are stated in the opinion.

Austen G. Fox for appellants.

Frank A. Dudley for respondent.

VANN, J. On April 6th, 1887, the plaintiff sold the property of the defendants, under an agreement that he was to receive compensation for his services in making the sale, but there was a difference between them as to the amount. The sale was not completed until about June 20th, 1887, on which day Mr. Chauncey, who represented the defendants in all their dealings with the plaintiff, wrote to him as follows: "I heard to-day from Mr. Griffith that the sale to Weston was completed on Saturday. I send you a check for three hundred dollars (1 per cent on $30,000), your commission on the sale. Please sign and return the enclosed voucher." There was a check for $300 enclosed, payable to the order of the plaintiff, and also an unsigned receipt in these words: "Suspension Bridge, New York, June , 1887. Received of the Tomlinson Estate three hundred dollars, in full for commissions for sale to J. A. Weston of 66 acre lot. $300." Under date of June 23d, 1887, the plaintiff wrote to Mr. Chauncey, saying: "I don't know what you mean by sending me a check for $300. I want my 5 per cent commission on the $30,000." No reply was made to this letter, although one was requested, and during the latter part of July or the first of August following, the plaintiff, who had in the meantime retained both check and voucher, called on Mr.

Chauncey in the city of New York, and, as he testified on the trial, asked him what he meant by sending a check for "$300 commission for selling the farm. I said that I wanted my 5 per cent commission, as the understanding was between us. He said he wouldn't give one cent more, and I left him. . . . I knew there was a dispute between us, I claiming $1500 and he claiming that I was only entitled to three hundred dollars, and that his check paid that, and with the knowledge of that condition of affairs I kept the check from July, 1887, to January, 1888, and then endorsed it and drew the money, and sent him a receipt on account." The plaintiff never returned the blank voucher sent to him with the check, but in January, 1888, he endorsed the check and drew the money on it, and then, under date of January 19th, 1888, wrote to Mr. Chauncey stating that he enclosed a receipt for $300, as part payment for his services, and that he still claimed he was entitled to 5 per cent commission and insisted on being paid at that rate. The receipt enclosed was for $300, "in part payment for commission." On January 24th, 1888, Mr. Chauncey wrote to the plaintiff acknowledging receipt of the letter and voucher, and stating that he should "consider this payment in full for all commissions." The plaintiff did not return or offer to return the money so paid him. When the plaintiff rested, as well as at the close of the evidence, the defendants asked the Court to direct a verdict in their favor on the ground that, upon the foregoing facts, which were not disputed, the plaintiff was not entitled to recover, but the motions were denied and the defendants excepted.

Two questions of fact were submitted to the jury: First, whether there was an agreement to pay plaintiff at the rate of 5 per cent. Second, whether the plaintiff agreed to accept the $300 "in place of his claim for 5 per cent commission." The jury were instructed to find for the plaintiff if they thought that the agreement to pay at that rate was made, and that the agreement to accept was not made, otherwise for the defendants. They rendered a verdict in favor of the plaintiff for $1200. The judgment entered on the verdict was affirmed by the General Term upon its opinion written on a formal appeal, but then the record did not contain the proposed receipt in full. Nassoiy *v.* Tomlinson, 65 Hun, 491–493.

The question presented by this appeal is whether the undisputed evidence so conclusively established an accord and satisfaction as to leave no question of fact for the jury upon that subject. An accord and satisfaction requires a new agreement and the performance thereof. Jaffray *v.* Davis, 124 N. Y. 164.

It must be an executed contract founded upon a new consideration, although an agreement to accept an independent executory contract has been held sufficient. Kromer *v.* Heim, 75 N. Y. 574 ; Morehouse *v.* Second National Bank, 98 N. Y. 503 ; 2 Parsons on Contracts (7th ed.), 817, 820. If the claim is liquidated, the mere acceptance of a part, with the promise to discharge the whole, is not enough, for there is no new consideration. Ryan *v.* Ward, 48 N. Y. 204. If the claim is unliquidated, the acceptance of a part and an agreement to cancel the entire debt, furnishes a new consideration which is found in the compromise. A demand is not liquidated even if it appears that something is due, unless it appears how much is due, and when it is admitted that one of two specific sums is due, but there is a genuine dispute as to which is the proper amount, the demand is regarded as unliquidated, within the meaning of that term as applied to the subject of accord and satisfaction. Such is the case before us, as appears from the testimony of the plaintiff, already quoted. He claimed that the defendants owed him the sum of $1500, under an agreement to pay him at one rate, while the defendants claimed that they owed him but $300, under an agreement to pay him at another rate. The verdict of the jury upon this issue neither removed from the case the fact that a dispute had existed, nor affected its force, as otherwise the compromise of a disputed claim could never be made the basis of a valid settlement. We come, therefore, to the question whether there was an acceptance by the plaintiff of an offer by the defendants to pay the sum they conceded to be due in full satisfaction of the sum he claimed to be due. In order to determine this question, the letter of June 20th, 1887, with the check and receipt enclosed therewith, should be construed together, so as to see whether the offer was made upon a specified condition. When thus construed, we find the defendant saying to the plaintiff, in substance : " Here is a check for $300 to pay your commission on the sale ; sign and return the enclosed voucher, in full of your commissions." As reflecting the intention of the parties, it is the same in effect as if the check had been written " in full," as was the case in Reynolds *v.* Empire Lumber Co., 85 Hun, 470. The plaintiff understood the condition as his testimony shows, and he never signed or returned the voucher and did not use the check for nearly seven months. In the meantime he had an interview with the agent of the defendants and learned that they still adhered to their position of refusing to pay any more than the check sent " in full." After hesitating for five months longer, he used the check and sent the defend-

ants a receipt on account, writing them that he claimed a balance. This declaration was *ex post facto* and could have no effect unless acquiesced in by the defendants, but they promptly disclaimed and insisted that their debt was paid. We think that the undisputed evidence shows conclusively that the offer was made in settlement of the claim and that the plaintiff so understood it, when, by using the check he accepted the offer. The written evidence, the personal interview and the acts of the plaintiff permit no other conclusion. The circumstances do not admit of different inferences or present any question of fact, for the letter and receipt can have but one interpretation.

The plaintiff cannot be permitted to assert that he did not understand that a sum of money, offered "in full," was not, when accepted, a payment in full. As was said in Hills *v.* Sommer, 53 Hun, 392, 394, he was "bound either to reject" the check "or, by accepting it, to accede to the defendants' terms." The money tendered belonged to them, and they had the right to say on what condition it should be received. "Always the manner of the tender and of the payment shall be directed by him that maketh the tender or payment and not by him that accepteth it." Pinnel's Case, 5 Co. 117. The plaintiff could only accept the money as it was offered, which was in satisfaction of his demand. He could not accept the benefit and reject the condition, for if he accepted at all it was *cum onere*. When he endorsed and collected the check, referred to in the letter asking him to sign the enclosed receipt in full, it was the same, in legal effect, as if he had signed and returned the receipt, because acceptance of the check was a conclusive election to be bound by the condition upon which the check was offered. The use of the check was *ipso facto* an acceptance of the condition. The minds of the parties then met so as to constitute an accord, and, as was said by this Court in Fuller *v.* Kemp, 138 N. Y. 231, "the acceptance of the money involved the acceptance of the condition, and the law will not permit any other inference from the transaction." We cannot distinguish the case in hand from the case last cited, where a check for $400 was mailed with a letter stating that it was sent as payment in full of an unliquidated demand for $670. The creditor accepted the check and used it, but "again sent his bill to the defendant, charging $670 for his services and crediting upon it $400 received by check." The debtor answered, calling attention to the condition upon which he had sent the check, and requesting the creditor "either to keep the money upon the condition named, or return it to him by first mail," but no reply was made, and the money was not returned.

Upon these facts the Court held that "when a debtor offers a certain sum of money in full satisfaction of an unliquidated demand, and the creditor accepts and retains the money, his claim is cancelled, and no protest, declaration or denial on his part, so long as the condition is insisted upon by the debtor, can vary the result."

The principle that controlled that case must also control this, and the judgment appealed from should, therefore, be reversed and a new trial granted, with costs to abide the event.

All concur, except Haight, J., not sitting.

Judgment reversed.

CHAPTER XI.

RELEASE.

WALMESLEY AND NELSTROP *v.* COOPER.

IN THE QUEEN'S BENCH, NOVEMBER 29, 1839.

[*Reported in* 11 *Adolphus & Ellis* 216.]

DEBT for goods sold and delivered, and on an account stated.

Plea: that, after defendant became indebted to plaintiffs, and before the commencement of the suit, the plaintff, Walmesley, by a certain indenture, released to defendant the several debts in the declaration mentioned, and all damages sustained by him by reason of the detention thereof and otherwise, and all causes of action, claims, and demands in respect of the same. Verification.

Replication: that the indenture mentioned in the plea was and is an indenture purporting to be made July 11th, 1837, between defendant of the first part, T. Tattersall and C. Watts, of the second part, and several creditors of the defendant of the third part, and is as follows: (The replication then set out at length a deed by which the defendant assigned his estate and effects to Tattersall and Watts, upon trust to sell them and to divide the proceeds ratably according to their debts among the parties to the deed of the third part, who should execute it on or before August 1st, 1837; and the several parties whose hands and seals were subscribed and set thereto, of the third part, for themselves severally did thereby covenant with the defendant that they, or any of them, should not, nor would, at any time thereafter, prosecute, arrest, molest, interrupt, or disturb the defendant, or attach the goods which he might thereafter acquire for any debt then owing to them respectively from the defendant, but would accept such dividend or composition as should arise from the estate assigned, in full satisfaction of their respective demands.) That the plaintiff Walmesley, being one of the creditors, subscribed and executed the deed as one of the parties of the third

part after the said August 1st, and not before ; and by reason thereof no dividend had been, or would become, due or payable to the plaintiffs, or to either of them, in respect of the said assignment ; nor have the plaintiffs, or either of them, received any dividend in respect of their debt ; and the said indenture had been and was of no avail to the plaintiffs, or either of them. Verification.

Rejoinder : that, before and at the time when the plaintiff Walmesley executed the indenture, the two plaintiffs were creditors of the defendant for the moneys mentioned in the declaration, and plaintiff Walmesley then had notice of the contents of the indenture, and of the clause therein as to August 1st, and of all other provisions therein. Verification.

Demurrer and joinder.

The demurrer was argued in this vacation, November 29th.[1]

Tomlinson for the plaintiff. The only question is, whether the covenant in the indenture operates as a release of the joint debt of the plaintiffs. The recital of the deed and its context show that the operation was only to be co-extensive with the consideration, and, therefore, as the plaintiffs received no advantage from the trust (the plaintiff Walmesley not having executed before August 1st, and the plaintiff Nelstrop not having executed at all), the release must be restrained so as not to apply to a debt due to the plaintiffs jointly. [As the judgment did not proceed on this ground, the rest of this head of argument is omitted.] Assuming the covenant in the indenture to apply to joint debts, it is the subject of a cross action, and is not pleadable as a release against both the plaintiffs. This construction will throw the loss where it ought to fall, viz., on Walmesley alone, and is agreeable to principle and authority. The principle is that, where a recovery by the plaintiff, against the defendant would necessarily give the defendant a right of action against the plaintiff to recover back the fruits of the first judgment, there, to avoid circuity of action, a covenant not to sue may be pleaded as a release. But here the covenantor and covenantee are not the only parties interested. The plaintiff Nelstrop is not shown to be a party to the covenant, or privy to it. The doctrine, that a covenant not to sue may operate as a release, has been adopted by the Courts slowly, and with many qualifications. Lacy *v.* Kinaston[2] is an early authority in restraint of the rule. In Dean *v.* Newhall[3] it was held that the obligee, who had covenanted not to sue one of two joint and several obligors, might sue the other,

[1] Before Lord Denham, C J., Patteson, Williams, and Coleridge, J.

[2] 1 Ld. Ray. 688 ; S. C. 2 Salk. 575 ; 3 Salk. 298. [3] 8 T. R. 168.

although a release to one would have been a bar as to both. In Hutton *v.* Eyre[1] the same point was decided where the debt was a joint one, and not joint and several; and Gibbs, C.J., states in general terms that "the rule, that a covenant not to sue operates as a release, applies only to cases were the covenantor and covenantee are single."

Wightman, *contra*. As a release by one of two joint debtors is a discharge of the whole action, so where the right of action is gone as to one, whether by covenant or otherwise, it is gone as to both. Unless this be the proper construction, there will be circuity; for, if Nelstrop died, Walmesley would be entitled to sue alone by survivorship for the joint debt. It cannot be denied by the plaintiffs that the covenant would then be operative as a release; yet the principle is the same. [Patteson, J. Suppose Walmesley dead, and Nelstrop sues as survivor, is there any circuity?] The release operates on the debt, and not merely on the debtor. Whatever is a bar to one must be a defence against both, where entirety of interest obliges both to join. In Hutton *v.* Eyre[2] the Court relied in some degree upon the apparent intention of the parties not to release the co-contractor; and intention may certainly restrain the effect of an express release. In all the cases cited, except Hutton *v.* Eyre,[3] the plaintiff might have sued alone before the release. There is nothing that should, on principle, prevent a covenant like this from having the effect of a release; for, if the law gives a partner the power to extinguish a joint debt, it seems of little importance whether it be by adopting the form of a release, or of an absolute covenant. One is a release in terms; the other by construction of law. That a discharge of one obligor by construction of law, as by making him an executor of the obligee, will be a discharge of both, was decided in Cheetham *v.* Ward,[4] and was recognized in Nicholson *v.* Revill.[5] [Patteson, J. The covenant in the deed is not even a covenant with respect to joint debts; nor does it profess to be a covenant by Walmesley for himself and partner.] The covenant is general, and applicable to all debts for which the plaintiff Walmesley might sue; nor does it appear that there were any other than joint debts due to him. [Patteson, J. I doubt whether a release by A. of a debt due to him would release debts due to him and B. jointly.] It would, if there were none but joint debts.

Tomlinson in reply. Hutton *v.* Eyre[6] has not been answered

[1] 6 Taunt. 289.
[2] *Ibid.* 289, 296.
[3] *Ibid.*
[4] 1 B. & P. 630.
[5] 4 A. & E. 675.
[6] 6 Taunt. 289.

or explained. A covenant not to sue is not to be put on the footing of a release in law ; but the operation of a release is given to it in certain cases and for a certain purpose ; that is, to avoid the expense and needless form of cross actions. The instance put, of a constructive release by making the debtor an executor, depends on the technical rule that a party cannot be both plaintiff and defendant at common law ; where that rule does not obtain, as in equity, no such operation is permitted.

Cur. adv. vult.

On the following day (November 30th) the judgment of the Court was delivered by

Lord DENMAN, C.J. This was an action by two for a joint debt. Plea : that Walmesley, one of the plaintiffs, by deed of composition, released the defendant from the debt. The replication sets out the deed which contains no release in terms, but a covenant by the plaintiff not to sue the defendant for any debt due from the defendant to him. Neither the amount nor nature of the debt from the defendant to Walmesley, to which the covenant applied, appears on the deed, nor in the schedule attached to it.

The defendant argued that this covenant amounted to a release of the joint debt, which was the subject-matter therein referred to. But a covenant not to sue has been held equivalent to a release on no other principle than that of avoiding circuity of action, *i.e.*, the scandal and absurdity of allowing A. to recover against B., in one action, the identical sum which B. has a right to recover in another against A. The law, when it clearly detects the possibility of such a waste of the suitor's money and its own process, as well as of the public time, will interpose to prevent its happening. But if the parties thus opposed in interest are not the same, the principle cannot apply. If one of two plaintiffs covenants not to sue for a joint debt, he may be liable for a breach of that covenant if both afterward sue. But if he is then sued by the debtor for breach of covenant, he alone must answer for it. The two will have recovered according to defendant's obligation to them ; but that one only will be compellable to refund who has entered into a counter obligation with their debtor not to sue him. The subject-matter of the two actions may be called the same, being the same in amount, in one sense ; but the parties are different ; the partnership losing nothing by the separate contract of one of the partners, who, however, has made himself personally liable by not performing it.

This appears not only to be a fair deduction from the prin-

ciple, but also strictly conformable with all the decisions that were brought before us.

We think that the joint debt is not released by the deed set forth, and that the plaintiffs are entitled to our judgment.

Judgment for the plaintiffs.

GIBBONS *v.* VOUILLON.

IN THE COMMON PLEAS, NOVEMBER 16, 1849.

[*Reported in* 8 *Common Bench Reports* 483.]

DEBT, for interest, and for money due upon an account stated.

The defendant pleaded, that, after the contracting of the said debts, and before the commencement of this suit, to wit, on May 17th, 1843, by indenture then made between the defendant of the first part, A. B., C. D., and E. F., of the second part, and the plaintiff and divers other persons, therein described as creditors of the defendant, of the third part,— reciting, that the defendant had for some time past carried on the business of a silk-mercer ; that the several debts due unto the parties thereto of the second and third parts, which were set opposite to their respective names, had accrued due ; that the defendant was unable immediately to satisfy the said debts ; and that it was considered, that, with a view to the gradual realization of his effects, it would be more advantageous to all parties interested, that the defendant should, for the period of five years, be permitted to carry on the said business under the inspection of the said A. B., C. D., and E. F.,— it was agreed that the business which had been so carried on by the defendant should thenceforth be carried on under the superintendence of inspectors on behalf of the said creditors, for the term of five years from the day of the date of the said indenture, or until the inspectors should deem it expedient to wind up the said business under the provision in such behalf thereinafter contained, or until the letter of license thereinafter granted, should be revoked : That, in pursuance of the said recited agreement, the said several persons parties thereto of the second and third parts, did, by the said indenture, give and grant unto the said defendant, until May 17th, 1848, or until the license by the said indenture granted should have been determined under the provisions thereinafter contained, full and free license and authority to pass and repass to and from, and reside in, any place where the nature of the business might

require, and to carry on the said business, and to collect and dispose of the estate and effects of the defendant under the superintendence of the inspectors for the time being; and, further, that, if any of the said persons parties thereto of the second and third parts, or the co-partners, executors, administrators, or assigns of any of them, should, at any time thereafter during the continuance of the license thereby granted, molest or interfere with the defendant, contrary to the true intent and meaning of the said indenture, then and in that case, and thenceforth, the defendant, and his heirs, executors, administrators, and assigns, should be relieved, exonerated, acquitted, and forever discharged of and from all debts and demands whatsoever which were then due unto, or then could be made by, the creditor or creditors respectively by whom the said letter of license thereinbefore contained, should in any such respect be contravened, and of and from all manner of actions, suits, damages, costs, charges, expenses, and claims, by reason, on account, or in consequence of the same debts or demands respectively, and that the said indenture should or might be pleaded in bar to such respective debts or demands accordingly—as by the said indenture would appear: That, after the contracting of the said debts, and before the commencement of this suit, to wit, on, etc., the plaintiff signed, sealed, and as his act and deed delivered the said indenture to the defendant as, and then became and was, a party thereto of the third part; and at the time of the plaintiff's so executing and delivering, and becoming a party to, the said indenture, the plaintiff was a creditor of the defendant for and in respect of the said debt in the declaration mentioned, and not otherwise; and the plaintiff so executed and delivered, and became a party to, the said indenture, as a creditor for and in respect of the said debt, and for and in respect of the causes of action in the declaration mentioned and not otherwise—profert of the indenture: Averment, that the said term of five years in the said indenture mentioned, had not expired at the time of the commencement of this suit, and that the defendant had performed all things in the said indenture contained on his part to be performed; and that, after the making of the said indenture, and during the continuance of the license thereby granted, and while the debts in the declaration mentioned were due to the plaintiff, to wit, on, etc., the plaintiff did molest and interfere with the defendant, contrary to the true intent and meaning of the said indenture, by then instituting and commencing this suit against the defendant, and, by means of the premises, then released, exonerated, acquitted, and forever discharged

the defendant of and from the debt, damages, and causes of action in the declaration mentioned, and of and from all actions, suits, damages, costs, charges, expenses, and claims, by reason on account, or in consequence of the said debt, according to the true intent and meaning of the said indenture —verification.

General demurrer and joinder.

Willes in support of the demurrer.

Hugh Hill, *contra*.

WILDE, C.J. This question arises upon a plea which sets forth an agreement under seal between the defendant of the first part, three individuals named, as trustees, of the second part, and the plaintiff and certain other persons, creditors of the defendant, of the third part ; and the plea, which is pleaded either as a bar to the action generally, or, in bar of the further maintenance of the action, states that the defendant had carried on the business of a silk-mercer ; that the several debts due to the parties of the second and third parts, which were set opposite to their respective names, had accrued ; that the defendant was unable immediately to satisfy those debts ; that, for the purpose of realizing his effects, it had been deemed advantageous to all the parties interested, that the defendant should, for five years, be permitted to carry on the business, under the inspection of the trustees ; and that it was agreed that the business should be so carried on for the said term of five years. The plea then goes to state, that, in pursuance of the agreement, the several persons parties thereto of the second and third parts, by that indenture gave and granted unto the defendant until May 17th, 1848 (the indenture bearing date May 17th, 1843), full and free license and authority to pass and repass, etc.; and that it was further provided, that, if any of the said persons parties thereto of the second and third parts, should, at any time thereafter during the continuance of the license thereby granted, molest or interfere with the defendant, contrary to the true intent and meaning of the said indenture, the defendant should be released, exonerated, acquitted, and forever discharged of and from all debts and demands whatsoever which were then due unto, or then could be made by, the creditor or creditors respectively by whom the said letter of license thereinbefore contained should in any such respect be contravened, and of and from all manner of actions, suits, etc., by reason, on account, or in consequence of the same debts or demands respectively, and that the said indenture should or might be pleaded in bar to such respective debts or demands accordingly. The molestation or interference

herein mentioned must be intended to mean such sort of molestation and interference as the parties lawfully might resort to, having relation to their situation as creditors and debtor. The question is, whether or not effect may be given to this agreement of the parties. Now, the first part of the deed operates as a letter of license, with a covenant on the part of the creditors not to sue within a limited time. This, it is contended, on the part of the plaintiff, cannot be pleaded in bar ; but it is said, upon the supposed authority of Ford *v.* Beech, that the only remedy of the covenantee is, by a cross action for damages. Nothing, however, fell from the Court in Ford *v.* Beech, to countenance that supposition. Why is it that a covenant not to sue for a limited time cannot be pleaded in bar? By reason of the rule that the right to a personal action once vested, and suspended, by the voluntary act of the party, for however short a time, is precluded and gone forever. It could only be pleaded in bar ; for, that is its legal operation. To have allowed the agreement in Ford *v.* Beech to be pleaded in bar as a release, would have been obviously contrary to the intention of the parties ; and no injustice followed from holding that the defendant's remedy for a breach was to be found in a cross action. But how does that apply where we have to deal with express and unequivocal words, and in a case where there are circumstances to warrant our concluding that the parties intended to give a totally different effect to the contract from what is before stated? Here, we have to deal with a contract entered into in express terms between a debtor and a body of twenty or thirty creditors, each of whom, for the benefit of the general concern, agrees that the debtor shall for a given period continue to carry on the business without molestation, and that, if that contract should be contravened by any creditor molesting or interfering with the debtor, such molestation or interference should operate an extinguishment of the debt, and that the indenture might be pleaded in bar to such debt. How would it be possible to secure the object the parties had in view, if effect could not be given to the agreement in the terms in which they have framed it? The intention is beyond doubt. A covenant not to sue for a given time enures a release, not by the mere agreement of the parties, but by operation of law.

Then it is said that that which has occurred here is not a molestation within the meaning of the deed. Looking at all the circumstances, it is impossible to doubt that suing the debtor was the very species of molestation which the parties sought to guard against, and no other. They clearly could not have had anything else in their contemplation. When,

therefore, this action—which in the ordinary course would go on to judgment and execution—was brought, the defendant had a right to assume that it was brought for the purpose of molesting or interfering with him, and so preventing him from carrying into effect the contract he had entered into. In the absence, therefore, of anything to control it, it seems to me that the parties contemplated a molestation by suing out a writ.

The cases referred to in Rolle's Abridgment appear to me to afford distinct authority on the present occasion. We are to consider what is the effect of this deed, taking the whole of it together. On the part of the defendant, it is contended that the deed, taken altogether, operates as a release ; and accordingly he pleads it in bar. The plaintiff's counsel, on the other hand, argues with much ingenuity, that, if we hold it to be a release, we must hold it to be a release from the moment of its execution ; and that is manifestly contrary to the intention of the parties. To extinguish the debt, would manifestly be to defeat the whole intention of the deed. But upon what assumption is that ground taken ? Upon the assumption that every release, to have any operation at all, must operate from the moment at which it is given. I must confess I do not assent to that proposition. I do not see why parties may not agree that a certain instrument shall operate as a release, from the happening of such an event. The passage in Co. Litt. referred to by my brother Maule,[1] seems to show that they may. There is, then, a clear and manifest intent, to be collected from the deed, that it shall operate as a release, from the happening of the event which the parties contemplated, viz., the molestation which has happened. It is no reason why effect should not be given to the clear intention of the parties, that, in so doing, we necessarily carry its operation somewhat beyond what was contemplated.

For these reasons, I am of opinion that the defendant is entitled to our judgment.

MAULE, J., concurred.

TALFOURD, J., concurred.

Judgment for the defendant.[2]

[1] With which agrees the judgment of Fineux, C.J., in T. 21 H. 7, fo. 24.

[2] The concurring opinion of V. Williams, J., has been omitted.—ED.

CHAPTER XII.

ILLEGALITY.

COWAN *v.* MILBOURN.

In the Exchequer, April 24, 1867.

[*Reported in Law Reports, 2 Exchequer*, 230.]

Action (in the Court of Passage, Liverpool) for breach of a contract to let rooms to the defendant. The first and third counts of the declaration related to contracts to let to the defendant the St. Anne's Assembly Rooms, Liverpool, for the purpose of lectures, which were to be delivered there on January 20th and February 3d, 1867; and the second count related to a contract to let the same rooms to the defendant for the purpose of a ball and tea-party on January 29th.

To these counts the defendant, among other pleas, pleaded, fourthly, that, after making the alleged agreements respectively, the defendant was informed, and learned for the first time, that the plaintiff intended (as he did in fact intend) to use the rooms for certain irreligious, blasphemous, and illegal lectures or entertainments; whereupon the defendant, within a reasonable time, after satisfying himself as to the truth of the premises, gave notice to the plaintiff that he could not permit the plaintiff the use of the rooms for the purposes aforesaid, and thereupon notified to the plaintiff not to incur any further or other expense in relation thereto; and in like manner, and within such reasonable time as aforesaid, tendered and paid to the plaintiff the amount of the moneys which the plaintiff had paid him for the intended use of the rooms; and that his refusal to permit the plaintiff under the said circumstances, and for the said purposes, to use the rooms was the breach complained of.

The defendant, by his seventh plea, also relied upon the provisions of 21 Geo. 3, ch. 49, § 1.

Issue.

At the trial the following facts appeared in evidence:

In December, 1865, the plaintiff, who was secretary to the Liverpool Secular Society, hired of the defendant, through defendant's son, the rooms in question, for Sunday, January 20th, for the purpose of having lectures delivered there in advancement of the views of the society. He did not communicate to the defendant the subjects of the lectures, nor that they were to be delivered in connection with the society. He afterward hired the same rooms for the delivery of lectures on Sunday, February 3d, and for a ball and tea-party in memory of Tom Paine, on January 29th. On January 5th the subjects of the lectures for the morning, afternoon, and evening of January 20th were advertised by placards as "The Soul: Its Nature and Destination." "The Character and Teachings of Christ; the former Defective, the latter, Misleading." "Bible Morality and Bible Science;" and those of the lectures for February 3d as "The Sceptical Tendency of Bishop Butler's Analogy." "The Bible shown to be no more Inspired than any other Book; with a Refutation of Modern Theories thereon." "Catholicism, Protestantism, and Secularism: which contains most Truth, and which is best calculated to benefit Humanity?"

On January 17th the plaintiff received from the defendant's son a letter written the day previous, complaining of an evening lecture having been advertised, and alleging that the rooms were only let for the morning and afternoon, but making no complaint of the subject of the lectures; and on January 19th the defendant received from the plaintiff's attorney a letter of that date, entirely refusing the use of the rooms, but not assigning any reason. The plaintiff, having attempted without success to obtain possession of the rooms on the days in question, brought this action for breach of the several contracts.

It appeared upon the evidence of the chief constable of Liverpool, who was called for the defendant, that the defendant's refusal was caused by his interference, and by his threatened opposition to a renewal of the license attached to the rooms.

The learned judge ruled that the lectures announced were blasphemous and illegal, and that the plaintiff could not therefore recover on the agreement for the Sundays (January 20th and February 3d), but that he might recover on the agreement relating to the tea-party of January 29th; and a verdict for one farthing damages was found for the plaintiff on the second count, and a verdict was entered for the defendant on the first and third counts, with leave to the plaintiff (under 16 & 17 Vict. c. 21, § 45) to move this Court to enter a verdict for the plaintiff for £10 on each of those counts.

Littler moved accordingly. First, the allegation of blasphemy in the plea is not proved, for the only evidence of the character of the lectures is that afforded by the advertisements, which show nothing falling within that description. The test of blasphemy lies rather in the manner than the matter of what is said, and the current opinion in modern times has been that to support a prosecution for blasphemy there must be a scurrilous and indecent attack upon commonly received opinions, or a maintenance of views flagrantly opposed to ordinary morality. This is the view expressed in Blackstone's Commentaries, Vol. IV., p. 51,[1] and the same opinion is stated at length in Starkie on Libel, 1st ed., pp. 496–497, cited and adopted in Russell on Crimes, 4th ed., Vol. II., pp. 334–335; and it is stated to the same effect, though in somewhat different terms, in the 2d ed. of Starkie, Vol. II., pp. 146–147.[2] That

[1] "Though it is clear that no restraint should be laid upon rational and dispassionate discussions of the rectitude and propriety of the established mode of worship, yet contumely and contempt are what no establishment can tolerate."

[2] The passage in the earlier edition of Starkie, pp. 496–497, cited in Russell on Crimes, Vol. I., p. 334, is as follows: "It may not be going too far to infer from the principles and decisions, that no author or preacher who fairly and conscientiously promulgates the opinions with whose truth he is impressed, for the benefit of others, is, for so doing, amenable as a criminal; but a malicious and mischievous intention is in such cases the broad boundary between right and wrong; and thus, if it can be collected, from the offensive levity with which so serious a subject is treated, or from other circumstances, that the act of the party was malicious, then, since the law has no means of distinguishing between different degrees of evil tendency, if the matter published contain any such tendency, the publisher becomes answerable to justice."

The passage in the later edition, Vol. II., pp. 146–147, is as follows: "The very absurdity and folly of an ignorant man, who professes to teach and enlighten the rest of mankind, are usually so gross as to render his errors harmless; but, be this as it may, the law interferes not with his blunders so long as they are honest ones. . . . It is the mischievous abuse of this state of intellectual liberty which calls for penal censure. The law visits not the honest errors, but the malice of mankind. A wilful intention to pervert, insult, and mislead others, by means of licentious and contumelious abuse applied to sacred subjects, or by wilful misrepresentations or artful sophistry, calculated to mislead the ignorant and unwary, is the criterion and test of guilt. A malicious and mischievous intention, or (what is equivalent to such an intention in law as well as in morals) a state of apathy and indifference to the interests of society, is the broad boundary between right and wrong. If it can be collected from the circumstances of the publication—from a display of offensive levity, from contumelious and abusive expressions applied to sacred persons and subjects—that the design of the author was to occasion that mischief to which the matters which he publishes immediately tends—to destroy, or even to weaken, men's sense of religious or moral obligations—to insult those who

opinion is further supported by the remarks of Best, J., at the close of his judgment in The King *v.* Waddington.[1] If this is so, it follows that a lecture of this nature is not illegal.

[Bramwell, B. Not so ; an act may be illegal in the sense that it will not be recognized by the law as capable of being the foundation of any legal right, or that it may even deprive what it accompanies of that capacity, although it is followed by no penalty. The very point was illustrated by the case of Pearce *v.* Brooks[2] in this Court.]

So far as relates to the subject of the character and teaching of Christ, the Act of relief of 53 Geo. 3, ch. 160, § 2, exempts the plaintiff from the charge of illegality.

[Bramwell, B. Only from the penalties imposed by 9 & 10 Wm. 3 ch. 32, and from the penalties and disabilities to which Unitarians still remained subject in consequence of their exclusion from the benefits of the Act of Toleration, 1 Wm. & M. sess. 1, c. 18, § 17.]

With respect to the lecture on the authority and inspiration of the Scriptures, it can scarcely be said to be illegal to question their exclusive inspiration after the decision of the Privy Council in Bishop of Salisbury *v.* Williams.[3]

[Bramwell, B. The act of 53 Geo. 3, c. 160, does not repeal that part of 9 & 10 Wm. 3, c. 32, § 1, which is directed against those who "shall deny the Christian religion to be true, or the Holy Scriptures of the Old and New Testament to be of divine authority," and who shall on indictment or information be convicted thereof.]

It has not been commonly supposed that the recent attack on the Pentateuch by Bishop Colenso laid him open to such an indictment.

Secondly, the plea is not proved, because the reason alleged in it was not the reason given by the defendant when he refused the use of the rooms.

KELLY, C.B. It would be a violation of duty to allow the question raised to remain in any doubt. That question is, whether one who has contracted to let rooms for a purpose stated in general terms, and who afterward discovers that they are to be used for the delivery of lectures in support of a proposition which states, with respect to our Saviour and His teaching, that the first is defective and the second misleading,

believe, by casting contumelious abuse and ridicule upon their doctrines, or to bring the established religion and form of worship into disgrace and contempt—the offence against society is complete."

[1] 1 B. & C. 26, at p. 28.

[2] Law Rep. 1 Ex. 213.

[3] 2 Moore, P. C. (N. S.) 375.

is nevertheless bound to permit his rooms to be used for that purpose in pursuance of that general contract. There is abundant authority for saying that Christianity is part and parcel of the law of the land ; and that, therefore, to support and maintain publicly the proposition I have above mentioned is a violation of the first principles of the law, and cannot be done without blasphemy. I therefore do not hesitate to say that the defendant was not only entitled, but was called on and bound by the law, to refuse his sanction to this use of his rooms. It is contended that this was not the real motive which actuated the defendant, and that the evidence showed another and different motive, and that this reason was put forward only as an excuse. But I am of opinion that, whatever may have been the motive operating on his own mind, it was open to him by law, at the last moment before the rooms had been taken possession of, to refuse their use, and to justify that refusal on the ground that the plaintiff had in fact this purpose in view.

MARTIN, B. I am quite of the same opinion. I protest against the notion that this is any punishment of the persons advocating these opinions. It is merely the case of the owner of property exercising his rights over its use.

BRAMWELL, B. I am of the same opinion, and I will state my grounds. I think that the plaintiff was about to use the rooms for an unlawful purpose, because he was about to use them for the purpose of, "by teaching or advised speaking," "denying the Christian religion to be true, or the Holy Scriptures of the Old and New Testament to be of divine authority." That he intended to use the rooms for the purposes declared by the statute to be unlawful is perfectly clear, for he proposed to show that the character of Christ was defective, and His teaching misleading, and that the Bible was no more inspired than any other book. That being so, his purpose was unlawful ; and if the defendant had known his purpose at the time of the refusal, he clearly would not have been bound to let the plaintiff occupy them, for, if he would, he would then have been compelled to do a thing in pursuance of an illegal purpose. Neither if he had let the plaintiff into possession could he, for the same reason, have recovered the price for their letting. It is said he did not know of this purpose, or, at least, did not regard it, and gave another and different reason. But having refused to let the rooms, he might justify it on any ground that would support the refusal. This is laid down in Spotswood v. Barrow,[1] wherein an action for wrongful dismissal the defendant justified on the ground that the plaintiff had

[1] 5 Ex. 110.

misappropriated moneys, and the Court held that the plea was supported, although the defendant failed to show that the fact was known to him before he dismissed the plaintiff. Rolfe, B., there says :[1] "The subject may be illustrated by what was said in Doe d. Daniell *v.* Woodruffe,[2] viz., "where a party having a right of entry enters, it is not competent for him to repudiate any rights he may possess, and to say he has entered as a trespasser, or by some other than his real title. As soon as he has entered he is possessed, whether he will or no, by virtue of every title which he had in him, and which he could assert by entry. Littleton, § 695, is there referred to ; and that old authority seems to me to be founded on very good sense." This appears to me to be good law, and the reason of it is apparent. You need give no reason at all. If you refuse to perform your contract, and the other party asks why, you may say, "Go to law and I will tell you." And your justification will depend on whether in fact and law he could compel you to perform. Now it appears that the plaintiff here was going to use the rooms for an unlawful purpose ; he therefore could not enforce the contract for that purpose, and therefore the defendant was not bound, though he did not know the fact. It is strange there should be so much difficulty in making it understood that a thing may be unlawful, in the sense that the law will not aid it, and yet that the law will not immediately punish it. If that only were unlawful to which a penalty is attached, the consequence would be that, inasmuch as no penalty is provided by the law for prostitution, a contract having prostitution for its object would be valid in a Court of Law. The rule must be refused, and I do not regret the result, and on this ground, that this placard must have given great pain to many of those who read it.

Rule refused.

WAUGH *v.* MORRIS.

IN THE QUEEN'S BENCH, JANUARY 24, 1873.

[*Reported in Law Reports*, 8 *Queen's Bench*, 202.]

DECLARATION on a charterparty, by which plaintiff's ship Castor was chartered by one Jacques, for a voyage from Trouville to London, under which seventeen bales of pressed hay were shipped, according to terms of bills of lading, by which the hay was to be delivered at the port of London to order,

[1] At p. 113. [2] 10 M. & W. 608, at p. 632.

which bills were endorsed to defendant, claiming eighteen days' demurrage at London beyond the lay days, at 50*s.* a day, as per charter.

Pleas, *inter alia*, 7 : That Trouville is a place in the territory of the French Republic, and that the hay agreed, under the charterparty and bill of lading, to be loaded on board the plaintiff's vessel, was hay to be loaded at Trouville, and that by the charterparty and bill of lading, the plaintiff agreed to bring the hay so loaded at Trouville into a port of Great Britain, to wit, London, and to deliver the same there, in accordance with the usage and custom of the port ; that is to say, to land the hay at a proper landing-place within the port of London, and to deliver the same when so landed there. That at the time of the making of the charterparty and bill of lading, during all the time that the ship with the hay on board was and was detained in the port of London, there was in force an Order in Council, made by Her Majesty's Privy Council, dated March 9th, 1871, under the Contagious Diseases (Animals) Act, 1869, to wit : 1. "This order shall take effect from immediately after the 13th of March, 1871, and words in this order have the same meaning as in the Act of 1869. 2. Cattle brought from any place in the territory of the French Republic, or from any place in Belgium, shall not be landed at any port or place in Great Britain. . . . 4. The following articles, brought from any place as aforesaid, shall not be landed at any port or place in Great Britain . . . hay." And at the time of making the charterparty and bill of lading, and the loading the said hay, and bringing the same in the plaintiff's ship into the port of London for the purpose of landing the same within the port, according to the said custom and usage of the port, the plaintiff was a British subject, and was bound by the provisions of the Act of Parliament, and of the Order in Council.

Issue joined.

At the trial before Cockburn, C.J., at the sittings in London after Hilary Term, 1871, the plaintiff had a verdict for £45, the amount claimed, being for eighteen days' demurrage at 50*s.*; with leave to move to enter a verdict for defendant, if the facts proved the plea of illegality.

A rule was afterward obtained accordingly, on the ground that the contract sued on was illegal, and could not be enforced, being for and relating to an illegal purpose, and contrary to the statutes.

The facts are sufficiently stated in the judgment.

Butt, Q.C., and *R. E. Webster* showed cause.

Milward, Q.C., and *Maclachlan* in support of the rule.

The judgment of the Court (Cockburn, C.J., Blackburn and Mellor, JJ.) was delivered by

BLACKBURN, J. This is an action brought by the owner of a ship against the charterer for detaining the ship, in which the plaintiff has obtained a verdict, subject to leave to move to enter the verdict for the defendant, if the facts proved establish a plea of illegality.

On the trial before the Lord Chief Justice the material facts appeared to be, that the charterparty was made in France on October 7th, 1871, between the agent of the defendant and the master of the ship.

By the charterparty it was stipulated that the ship, then at Trouville, a port in France, should there load a cargo of pressed hay and proceed therewith direct to London ; and a term in the charterparty was to the effect that all cargo should be brought and taken from the ship alongside.[1]

The defendant's agent verbally told the master that the consignees would require the hay to be delivered to them at a particular wharf in Deptford Creek, and that he should proceed there on his arrival in London, and this the master promised to do.

On arriving in the Thames the master proposed to proceed to the wharf, but then for the first time learned that by an Order in Council, made under the authority of the Cattle Diseases Act,[2] France was declared to be an infected country, and it was made illegal to land in Great Britain any hay brought from that country. He could not therefore proceed to the wharf and there deliver the cargo, for that would have been

[1] Article IV. of the charterparty was : " Le chargement sera prêt à livrer sous le palan."

[2] By 32 & 33 Vict. c. 70, § 78, the Privy Council may from time to time, by order, make such regulations as they think expedient for prohibiting or regulating the landing of any hay, straw, fodder, or other article brought from any place out of the United Kingdom, whereby it appears to the Privy Council contagion or infection may be conveyed to animals, or for causing the same to be destroyed, if landed. If any person lands, or attempts to land, any hay, straw, fodder, or other article in contravention of any such order, the same shall be forfeited in like manner as goods the importation whereof is prohibited by the Acts relating to the customs are liable to be forfeited ; and the person so offending shall be liable to such penalties as are imposed on persons importing or attempting to import goods the importation whereof is prohibited by the Acts relating to the Customs, without prejudice to any proceeding against him under this Act or any such order, but so that no person be punished twice for the same offence.

The Order in Council of March 7th, 1871, was in the terms set out in the seventh plea.

landing the hay, and illegal. After some delay the defendant received the cargo from alongside the ship in the river into another vessel and exported it. There was no legal objection to this being done,[1] but during the interval eighteen days beyond the lay-days elapsed, and it was for this detention that the plaintiff recovered.

It appeared that the Order in Council had been made and published before the charterparty was entered into, but that in fact neither the master of the ship nor the defendant's agent was aware that it had been made.

A rule was obtained, which was argued in Michaelmas Term before my Lord Chief Justice, my brother Mellor and myself, when the Court took time to consider.

We are of opinion that the rule should be discharged. The charterparty provides that the cargo was to be taken from alongside; and that being so, the consignee might select any legal and reasonable place within the port at which to take it from alongside. He, by his agent in France, named this wharf, which he supposed, erroneously, to be a legal place, and the master, under the same mistake, assented to this, as indeed he would have had no right to refuse, if it had really been a legal place. But when it turned out that the defendant had named a place for the performance of the contract where the performance was impossible, because illegal, that did not put an end to the contract, if the performance in any other way was legal and practicable. In the present case the performance by receiving the cargo alongside in the river without landing it at all was both legal and practicable. See The Teutonia,[2] a case which would have been precisely in point, if the Order in Council rendering the landing illegal had come into operation after the contract was made instead of before.

It was on the fact that the Order in Council existed at the time the contract was made that the argument for the defendant was mainly grounded.

It was said that the intention of both parties was, that the hay was to be landed, that therefore they intended to violate the law, and that it may be shown by extraneous evidence that a contract, on the face of it perfectly legal, is void because made with intent to violate the law, and that ignorance of the law makes no difference. But we think, in the first place, that it is a mistake to say that the plaintiff intended that the hay should be landed. He no doubt contemplated and expected

[1] All that was necessary was an order from the Customs for permission to transfer the hay for export to some other vessel named.

[2] Law Rep. 4 P. C. 171.

that the hay would be landed, for, except under very unusual circumstances, hay is not brought into the Thames for any other object ; but all that the shipowner bargained for, and all that he can properly be said to have intended, was that, on the arrival of the ship in London, his freight should be paid, and the hay taken out of his ship. If, unexpectedly, there had arisen a great demand for hay abroad, like that which existed when our army was in the Crimea, the consignee might have transhipped the hay and exported it without the shipowner having the slightest ground for complaining that his intention was frustrated. We agree that a contract, lawful in itself, is illegal if it be entered into with the object that the law should be violated ; if, as it is expressed in Pearce *v.* Brooks,[1] it is done for the very object of satisfying an illegal purpose, or, as it is expressed in McKinnell *v.* Robinson,[2] "for the express purpose of a violation of the law." But in the present case the shipowner never did even contemplate or believe that the defendant would violate the law. He contemplated that the defendant would land the goods which he thought was lawful ; but if he had thought at all of the possibility of the landing being prohibited, he would probably have expected that the defendant would in that case not violate the law. And he would have been right in fact in that expectation, for the defendant did not attempt to land the goods.

We quite agree, that, where a contract is to do a thing which cannot be performed without a violation of the law it is void, whether the parties knew the law or not. But we think, that in order to avoid a contract which can be legally performed, on the ground that there was an intention to perform it in an illegal manner, it is necessary to show that there was the wicked intention to break the law ; and, if this be so, the knowledge of what the law is becomes of great importance.

No one could for a moment contend, that if everything which happened in France had happened within the jurisdiction of our country, the plaintiff and defendant's agent could have been successfully indicted for a conspiracy to violate the law by landing these goods ; for there would have been a want of *mens rea*. And it seems to us that the *mens rea* is as necessary to avoid a contract, which can be legally performed, because when it was made it was with the object of satisfying an illegal purpose, as it is to render the parties criminally responsible.

Rule discharged.

[1] Law Rep. 1 Ex. 213. [2] 3 M. & W. at p. 442.

BENJAMIN F. PIXLEY ET AL. *v.* CHARLES W. BOYNTON ET AL.

IN THE SUPREME COURT OF ILLINOIS, SEPTEMBER TERM, 1875.

[*Reported in* 79 *Illinois* 351.]

APPEAL from the Circuit Court of Cook County; the Hon. John G. Rogers, J., presiding.

This was an action of *assumpsit*, brought by Charles W. Boynton, George S. Foster, and John S. Miller, partners, against Benjamin F. Pixley, Thomas W. Hall, and Joseph G. Hall, partners, upon a promissory note. The opinion of the Court contains a statement of the material facts.

Farlin Q. Ball for the appellants.

Prentiss & Hooke for the appellees.

SCOTT, C.J., delivered the opinion of the Court:

The judgment in favor of plaintiffs in the court below was for $31.33 in excess of the *ad damnum* in the declaration. That sum had been remitted in this Court by plaintiffs before the cause was submitted for decision. Under our present statute, this is permissible, and is in accordance with the practice that prevails.

The action is upon a promissory note, and defendants seek to avoid the payment on the ground the consideration is illegal. The special defence set up in the notice filed with the general issue is, that it was given in settlement of "differences" arising out of an optional contract in wheat, made on the Board of Trade, and that it was not the intention of any of the parties to the transaction to buy or sell, or deliver or receive grain, but their only purpose was to trade in "differences" in the price of grain on the Chicago market.

It will not be necessary to discuss the legal proposition, that such contracts are void, as being against a sound public morality, for the reason we do not think any such contract as defendants insist upon has been proven to have existed between the parties. The burden of proof is upon defendants to show the consideration of the note is illegal, and they ought, in a case like this, to be required to make this proof by a clear preponderance of the evidence. This they have not done.

The contract was made by Hall, one of the defendants, on behalf of Wallace, who was not himself a member of the board of trade, and could not by its usages make contracts in his own name in relation to transactions on 'change. In June, 1870, Wallace, through Hall, sold to Boynton, for his firm, 5000

bushels No. 2 spring wheat, at $1.12 per bushel, "seller July." Suddenly the price of wheat went up, and it was thought best to close up the matter. Accordingly, Hall, at the instance perhaps of Wallace, certainly in his interest, bought the wheat back from Boynton at an advance of fourteen cents per bushel. Neither Hall nor his firm had any real interest in the wheat, but as Hall and Boynton were both members of the board of trade, and as the contract was made in Hall's name, by his consent, and he was legally obligated to perform it, he would have been expelled had he not, in some satisfactory manner, closed up the matter with Boynton at the maturity of the contract. It was no doubt for this reason, as well as his legal liability, his firm gave the note upon which this action was brought.

A number of witnesses familiar with the rules of the board of trade were examined, and they all say this contract was in conformity with the custom of trade, and was a regular and legitimate contract. "Seller" the month, as that term is understood and used on the board of trade, is explained to mean the seller has until the last day of the month in which to make a delivery of any grain contracted to be sold. Under such a contract, as we understand the evidence, all the option the seller has is the privilege to deliver the grain at any time before the maturity of the contract. This is nothing more than a time contract, which is regarded on the board of trade and elsewhere as a legitimate and regular contract. Time contracts in relation to grain, as well as other commodities, are of daily occurrence, and must necessarily be in commercial transactions.

One witness says, the true idea of an "option" is "puts" and "calls." A "put" is defined in the evidence to be "a privilege of delivering or not delivering the grain," and a "call" is "a privilege of calling or not calling for the grain." The contract between the parties to this transaction was not an optional one, in the sense of "puts and calls." The only option the seller had was as to the time of the delivery. The legal effect of his agreement was that he should deliver the grain contracted to be sold within a limited period.

Whatever may have been the intention of Hall or Wallace, it seems clear that Boynton understood he was to have the grain at the maturity of the contract. His good faith was manifested, in that, immediately upon selling the grain back to Hall, for Wallace, he purchased a like amount at the price he had just sold, and upon the maturity of the contract, took the wheat and paid for it. Plaintiffs were extensively engaged in shipping grain, as shown by the testimony. Boynton emphati-

cally declares this was not a gambling transaction, so far as he was concerned, but that the grain was purchased in good faith for the legitimate purposes of commerce. There is nothing in the record to overcome his testimony in this regard.

The intention of the parties gives character to the transaction, and if either party contracted in good faith, he is entitled to the benefit of his contract, no matter what may have been the secret purpose or intention of the other party.

A *remittitur* having been entered, there is now no error in the record, and the judgment will be affirmed to the extent of $1000. But because there was error in the record before the *remittitur* was entered, all costs accruing in this Court up to the date of entering the *remittitur*, and the costs of entering the same, will be taxed against appellees.

Judgment affirmed.

PEARCE AND ANOTHER *v.* BROOKS.

IN THE EXCHEQUER, APRIL 17, 1866.

[*Reported in Law Reports, 1 Exchequer*, 213.]

DECLARATION stating an agreement by which the plaintiffs agreed to supply the defendant with a new miniature brougham on hire, till the purchase-money should be paid by instalments in a period which was not to exceed twelve months; the defendant to have the option to purchase as aforesaid, and to pay £50 down; and in case the brougham should be returned before a second instalment was paid, a forfeiture of fifteen guineas was to be paid in addition to the £50, and also any damage, except fair wear. Averment, that the defendant returned the brougham before a second instalment was paid, and that it was damaged. Breach, non-payment of fifteen guineas, or the amount of the damage. Money counts.

Plea 3, to the first count, that at the time of making the supposed agreement, the defendant was to the knowledge of the plaintiffs a prostitute, and that the supposed agreement was made for the supply of a brougham to be used by her as such prostitute, and to assist her in carrying on her said immoral vocation, as the plaintiffs when they made the said agreement well knew, and in the expectation by the plaintiffs that the defendant would pay the plaintiffs the moneys to be paid by the said agreement out of her receipts as such prostitute. Issue.

The case was tried before Bramwell, B., at Guildhall, at the

sittings after Michaelmas Term, 1865. It then appeared that the plaintiffs were coach-builders in partnership, and evidence was given which satisfied the jury that one of the partners knew that the defendant was a prostitute ; but there was no direct evidence that either of the plaintiffs knew that the brougham was intended to be used for the purpose of enabling the defendant to prosecute her trade of prostitution ; and there was no evidence that the plaintiffs expected to be paid out of the wages of prostitution.

The learned judge ruled that the allegation in the plea as to the mode of payment was immaterial, and he put to the jury the following questions : 1. Did the defendant hire the brougham for the purpose of her prostitution ? 2. If she did, did the plaintiffs know the purpose for which it was hired ? The jury found that the carriage was used by the defendant as part of her display, to attract men ; and that the plaintiffs knew it was supplied to be used for that purpose. They gave nothing for the alleged damage.

On this finding, the learned judge directed a verdict for the defendant, and gave the plaintiffs leave to move to enter a verdict for them for the fifteen guineas penalty.

M. Chambers, Q.C., in Hilary Term, obtained a rule accordingly, on the ground that there was no evidence that the plaintiffs knew the purpose for which the brougham was to be used ; and that if there was, the allegation in the plea that the plaintiffs expected to be paid out of the receipts of defendant's prostitution was a material allegation, and had not been proved. Bowry *v.* Bennett.[1]

[Pollock, C.B., referred to Cannan *v.* Bryce.][2]

Digby Seymour, Q.C., and *Beresford* showed cause.

M. Chambers, Q.C., and *J. O. Griffits* in support of the rule.

Pollock, C.B. We are all of opinion that this rule must be discharged. I do not think it is necessary to enter into the subject at large after what has fallen from the bench in the course of the argument, further than to say, that since the case of Cannan *v.* Bryce,[3] cited by Lord Abinger in delivering the judgment of this Court in the case of M'Kinnell *v.* Robinson,[4] and followed by the case in which it was so cited, I have always considered it as settled law, that any person who contributes to the performance of an illegal act by supplying a thing with the knowledge that it is going to be used for that purpose, cannot recover the price of the thing so supplied. If, to create that incapacity, it was ever considered necessary that the price

[1] 1 Camp. 348.
[2] 3 B. & A. 179.
[3] *Ibid.*
[4] 3 M. & W. at p. 441.

should be bargained or expected to be paid out of the fruits of the illegal act (which I do not stop to examine), that proposition has been overruled by the cases I have referred to, and has now ceased to be law. Nor can any distinction be made between an illegal and an immoral purpose ; the rule which is applicable to the matter is, *Ex turpi causâ non oritur actio*, and whether it is an immoral or an illegal purpose in which the plaintiff has participated, it comes equally within the terms of that maxim, and the effect is the same ; no cause of action can arise out of either the one or the other. The rule of law was well settled in Cannan *v.* Bryce ;[1] that was a case which at the time it was decided, I, in common with many other lawyers in Westminster Hall, was at first disposed to regard with surprise. But the learned judge (then Sir Charles Abbott) who decided it, though not distinguished as an advocate, nor at first eminent as a judge, was one than whom few have adorned the bench with clearer views, or more accurate minds, or have produced more beneficial results in the law. The judgment in that case was, I believe, emphatically his judgment ; it was assented to by all the members of the Court of King's Bench, and is now the law of the land. If, therefore, this article was furnished to the defendant for the purpose of enabling her to make a display favorable to her immoral purposes, the plaintiffs can derive no cause of action from the bargain. I cannot go with Mr. Chambers in thinking that everything must be found by a jury in such a case with that accuracy from which ordinary decency would recoil. For criminal law it is sometimes necessary that details of a revolting character should be found distinctly and minutely, but for civil purposes this is not necessary. If evidence is given which is sufficient to satisfy the jury of the fact of the immoral purpose, and of the plaintiffs' knowledge of it, and that the article was required and furnished to facilitate that object, it is sufficient, although the facts are not expressed with such plainness as would offend the sense of decency. I agree with my brother Bramwell that the verdict was right, and that the rule must be discharged.

MARTIN, B. I am of the same opinion. The real question is, whether sufficient has been found by the jury to make a legal defence to the action under the third plea. The plea states first the fact that the defendant was to the plaintiffs' knowledge a prostitute ; second, that the brougham was furnished to enable her to exercise her immoral calling ; third, that the plaintiffs expected to be paid out of the earnings of her prostitution. In my opinion the plea is good if the third

[1] 3 B. & A. 179.

averment be struck out; and if, therefore, there is evidence that the brougham was, to the knowledge of the plaintiffs, hired for the purpose of such display as would assist the defendant in her immoral occupation, the substance of the plea is proved, and the contract was illegal. When the rule was moved I did not clearly apprehend that the evidence went to that point; had I done so, I should not have concurred in granting it. It is now plain that enough was proved to support the verdict.

As to the case of Cannan *v.* Bryce,[1] I have a strong impression that it has been questioned to this extent, that if money is lent, the lender merely handing it over into the absolute control of the borrower, although he may have reason to suppose that it will be employed illegally, he will not be disentitled from recovering. But, no doubt, if it were part of the contract that the money should be so applied, the contract would be illegal.

PIGOTT, B. I am of the same opinion. I concurred in granting the rule, not on any doubt as to the law, but because it did not seem clear whether the evidence would support the material allegations in the plea. Upon this point, I think that the jury were entitled to call in aid their knowledge of the usages of the day to interpret the facts proved before them. If a woman, who is known to be a prostitute, wants an ornamental brougham, there can be very little doubt for what purpose she requires it. Then the principle of law expressed in the maxim which my Lord has cited governs the case. It cannot be necessary that the plaintiffs should look to the proceeds of the immoral act for payment; the law would indeed be blind if it supported a contract where the parties were silent as to the mode of payment, and refused to support a similar contract in the rare case where the parties were imprudent enough to express it. The plaintiffs knew the woman's mode of life, and where the means of payment would come from, and to require the proposed addition to the rule would be to make it futile. As to the expressions of Lord Ellenborough which have been relied on, I think they were only meant to give an illustration of what would be evidence of the plaintiffs' participation in the immoral act, and that we are not overruling anything that he has laid down.

BRAMWELL, B. I am of the same opinion. There is no doubt that the woman was a prostitute; no doubt to my mind that the plaintiffs knew it; there was cogent evidence of the fact, and the jury have so found. The only fact really in dispute is

[1] 3 B. & A. 179.

for what purpose was the brougham hired, and if for an immoral purpose, did the plaintiffs know it? At the trial I doubted whether there was evidence of this, but, for the reasons I have already stated, I think the jury were entitled to infer, as they did, that it was hired for the purpose of display—that is, for the purpose of enabling the defendant to pursue her calling, and that the plaintiffs knew it.

That being made out, my difficulty was, whether, though the defendant hired the brougham for that purpose, it could be said that the plaintiffs let it for the same purpose. In one sense, it was not for the same purpose. If a man were to ask for duelling pistols, and to say, "I think I shall fight a duel to-morrow," might not the seller answer, "I do not want to know your purpose; I have nothing to do with it; that is your business, mine is to sell the pistols, and I look only to the profit of trade." No doubt the act would be immoral, but I have felt a doubt whether it would be illegal; and I should still feel it, but that the authority of Cannan *v.* Bryce,[1] M'Kinnell *v.* Robinson[2] concludes the matter. In the latter case the plea does not say that the money was lent on the terms that the borrower should game with it; but only that it was borrowed by the defendant, and lent by the plaintiff "for the purpose of the defendant's illegally playing and gaming therewith." The case was argued by Crompton, J., against the plea, and by Wightman, J., in support of it; and the considered judgment of the Court was delivered by Lord Abinger, who says (p. 441): "As the plea states that the money for which the action is brought was lent for the purpose of illegally playing and gaming therewith, at the illegal game of 'hazard,' this money cannot be recovered back, on the principle, not for the first time laid down, but fully settled in the case of Cannan *v.* Bryce. This principle is that the repayment of money, lent for the express purpose of accomplishing an illegal object, cannot be enforced." This Court, then, following Cannan *v.* Bryce,[3] decided that it need not be part of the bargain that the subject of the contract should be used unlawfully, but that it is enough if it is handed over for the purpose that the borrower shall so apply it. We are, then, concluded by authority on the point; and, as I have no doubt that the finding of the jury was right, the rule must be discharged.

With respect, however, to the allegation in the plea, which, as I have said, need not be proved, and which I refused to leave to the jury, I desire that it may not be supposed we are overruling anything that Lord Ellenborough has said. It is mani-

[1] 3 B. & A. 179. [2] 3 M. & W. 434. [3] 3 B. & A. 179.

fest that he could not have meant to lay down as a rule of law that there would be no illegality in a contract unless payment were to be made out of the proceeds of the illegal act, and that his observation was made with a different view. In the case of the hiring of a cab, which was mentioned in the argument, it would be absurd to suppose that, when both parties were doing the same thing, with the same object and purpose, it would be a lawful act in the one, and unlawful in the other.

POLLOCK, C.B. I wish to add that I entirely agree with what has fallen from my Brother Martin, as to the case of Cannan *v.* Bryce.[1] If a person lends money, but with a doubt in his mind whether it is to be actually applied to an illegal purpose, it will be a question for the jury whether he meant it to be so applied ; but if it were advanced in such a way that it could not possibly be a bribe to an illegal purpose, and afterward it was turned to that use, neither Cannan *v.* Bryce, nor any other case, decides that his act would be illegal. The case cited rests on the fact that the money was borrowed with the very object of satisfying an illegal purpose.

Rule discharged.

HANAUER *v.* DOANE.

IN THE SUPREME COURT OF THE UNITED STATES, DECEMBER TERM, 1870.

[*Reported in* 12 *Wallace* 342.]

ERROR to the Circuit Court for the Eastern District of Arkansas.

This was an action by Doane against L. & J. Hanauer, to recover the amount of two promissory notes, dated in February, 1867. These notes were originally given by the said L. & J. Hanauer, under the firm of L. Hanauer & Co., to one Hunter, in settlement of an account between them and the firm of Hunter & Oakes, which had mostly accrued in the years 1860, 1861, and 1862. A portion of this account was for items of private and family use ; the residue was partly for supplies and commissary stores for the Confederate army sold by Hunter & Oakes to L. Hanauer, a recognized supply contractor of the Confederate government ; and partly for due-bills issued by Hanauer, as such contractor, to other persons in payment of

[1] 3 B. & A. 179.

army stores and supplies, and taken up by Hunter & Oakes at Hanauer's request, under a promise to redeem the same.

The question in the case was whether the notes sued on, having been given for the consideration mentioned, were valid.

The defendants asked the Court to charge thus :

" 1. If the jury find that Hunter & Oakes sold to L. Hanauer a quantity of goods and chattels knowing that the said Hanauer was purchasing them as supplies for the rebel army to carry on the war against the United States, and that the price of the same form a part of the consideration of the notes sued on, then they will find for the defendants.

" 2. If they find that L. Hanauer, acting as a purchasing agent for the Confederate States, in rebellion, gave out notes or due-bills for supplies furnished the rebel army with the knowledge of the persons from whom such purchases were made, of the use to which the said supplies were to be put, and that, during the time when the said due-bills were in the course of being issued, the said Hanauer made an agreement with said Hunter & Oakes that the latter should take up said due-bills and charge them to said Hanauer, the said Hunter & Oakes knowing the purpose for which the same were issued, and that the price of said due-bills so taken up forms any part of the consideration of the notes sued on, then they will find for the defendants."

The Court refused so to charge, and charged as follows :

" If these due-bills were taken up by Hunter & Oakes, after they were issued to the parties to whom they were payable, and upon the promise of Hanauer that he would redeem them, then, as between Hanauer and Hunter & Oakes, the surrender by Hunter & Oakes to Hanauer of such due-bills so taken up by them, would constitute a good and sufficient consideration for the amount thereof. And this is the law, although you may find that the parties to whom the due-bills were payable knew at the time of making the sale of supplies or property to L. Hanauer that he intended to turn the same over to the rebel army, and that Hunter & Oakes had notice of these facts. To affect the validity of the notes sued on, as to that part of the consideration made up of these due-bills, you must be satisfied that Hunter & Oakes were interested in furnishing the supplies to the rebel army for which the due-bills were given, or that what they did in the premises was done for the purpose or with the view of aiding in furnishing supplies to the rebel army, otherwise giving aid and comfort to the rebellion.

" Then, as to the other item, comprising a part of the consideration of the notes sued, the account of Hunter & Oakes

against Hanauer as supply contractor for supplies sold to Hanauer. It is asserted that Hunter & Oakes knew that the articles mentioned in this account were purchased by Hanauer to be turned over as supplies to the rebel army, and the defendant maintains that this knowledge of the use intended to be made by Hanauer of these goods made the sale illegal, and that the amount of these sales having been included in the notes sued on, they are illegal and void. This is not the law. Bare knowledge, on the part of Hunter & Oakes, that Hanauer intended or expected to turn the goods and property purchased from them over to the rebel army as supplies for said army would not make such sale of goods and property illegal and void. To make the sale of goods from Hunter & Oakes to Hanauer illegal and void, it must appear that Hunter & Oakes had some concern in furnishing the supplies to the rebel army, or that it was part of the contract between Hunter & Oakes and Hanauer that such goods should go to the support of the rebel army, or that the design of Hunter & Oakes, in making such sale, was to aid in furnishing supplies to the rebel army, or otherwise give aid and comfort to the rebellion. But if the goods were sold by Hunter & Oakes in the common and ordinary course of trade, and the only inducement to the sale of the goods on the part of Hunter & Oakes was the price agreed to be paid by Hanauer for the same, then the sale was a legal and valid sale, although Hunter & Oakes knew that Hanauer intended or expected to turn such goods over to the rebel army."

Judgment having gone for the plaintiff, the defendant, Hanauer, brought the case here on exceptions to the charge ; the question in this Court being, of course, the same one as in the Court below, to wit, whether the notes sued on, having been given for the consideration mentioned, were valid.

Watkins and *Rose* for the plaintiffs in error.

A. H. Garland, *contra*.

BRADLEY, J., delivered the opinion of the Court.

We have already decided, in the case of Texas *v.* White,[1] that a contract made in aid of the late rebellion, or in furtherance and support thereof, is void. The same doctrine has been laid down in most of the circuits, and in many of the State courts, and must be regarded as the settled law of the land. Any contract, tinctured with the vice of giving aid and support to the rebellion, can receive no countenance or sanction from the courts of the country. Are the notes in suit of this kind ? A portion of their consideration was stores and supplies furnished to the army contractor of the Confederate Government, and

[1] 7 Wallace, 700.

another portion was due-bills issued for the same consideration, and received by Hunter & Oakes with full notice of their character. If either of these portions of the consideration on which the notes were given was illegal, the notes are void *in toto*. Such is the elementary rule, for which it is unnecessary to cite authorities.

On the trial of the cause below, the judge, in charging the jury, instructed them that if Hunter & Oakes took up Hanauer's due-bills for value, at his request and on the faith of his promise to redeem them, made after he had given them out for supplies, these due-bills would constitute a good consideration for the notes. We do not think that this was a correct statement of the law. If Hanauer had borrowed money from Hunter & Oakes to redeem the due-bills himself, the transaction would have been different, and the loan of money would have been legal, although Hunter & Oakes had known for what purpose Hanauer wanted the money. They would have been one degree farther removed from the unlawful transaction. But, instead of this, they became the holders of the due-bills, knowing for what purpose and on what consideration they had been issued ; and hence their title was no better than that of the original holders. To vitiate this title it was not necessary, as stated by the judge, that Hunter & Oakes should have been interested in furnishing the supplies for which the due-bills were given ; nor that what they did should have been done with the view of aiding the rebel cause. If the due-bills were invalid in the hands of the original holders, they were invalid in the hands of Hunter & Oakes. Whether they were invalid depends on the solution of the question whether the sales of supplies to Hanauer, for the use of the Confederate army, was, or was not, an illegal transaction. We think it was. But on this subject it is proper to examine the views of the judge at the trial.

With regard to that portion of the consideration of the notes which consisted of supplies sold by Hunter & Oakes to Hanauer for the Confederate army, the judge instructed the jury that bare knowledge on the part of Hunter & Oakes that Hanauer intended, or expected, to turn the goods over to the rebel army, would not make the sale illegal and void, but that, to make it so, it must appear that Hunter & Oakes had some concern in furnishing the supplies to the rebel army, or intended to aid therein. In this instruction we think the judge erred. With whatever impunity a man may lend money or sell goods to another who he knows intends to devote them to a use that is only *malum prohibitum*, or of inferior criminality, he cannot do it, without turpitude, when he knows, or has every reason to

believe, that such money or goods are to be used for the perpetration of a heinous crime, and that they were procured for that purpose. In the words of Eyre, C.J., in Lightfoot *v.* Tenant,[1] "the man who sells arsenic to one who, he knows, intends to poison his wife with it, will not be allowed to maintain an action on his contract. The consideration of the contract, in itself good, is there tainted with turpitude which destroys the whole merit of it. . . . No man ought to furnish another with the means of transgressing the law, knowing that he intended to make that use of them." On this declaration Story, J., remarks: "The wholesome morality and enlarged policy of this passage make it almost irresistible to the judgment; and, indeed, the reasoning seems positively unanswerable."[2] Can a man furnish another with the means of committing murder, or any abominable crime, knowing that the purchaser procures them, and intends to use them, for that purpose, and then pretend that he is not a participator in the guilt? Can he wrap himself up in his own selfishness and heartless indifference and say, "What business is that of mine? Am I the keeper of another man's conscience?" No one can hesitate to say that such a man voluntarily aids in the perpetration of the offence, and, morally speaking, is almost, if not quite, as guilty as the principal offender.

No crime is greater than treason. He who, being bound by his allegiance to a government, sells goods to the agent of an armed combination to overthrow that government, knowing that the purchaser buys them for that treasonable purpose, is himself guilty of treason or a misprision thereof. He voluntarily aids the treason. He cannot be permitted to stand on the nice metaphysical distinction that, although he knows that the purchaser buys the goods for the purpose of aiding the rebellion, he does not sell them for that purpose. The consequences of his acts are too serious and enormous to admit of such a plea. He must be taken to intend the consequences of his own voluntary act.

The decision of Eyre, C.J., in the case above referred to, has been followed in several other English cases. It was followed by Lord Ellenborough in Langton *v.* Hughes,[3] where a druggist sold drugs of a noxious and unwholesome nature to a brewer, knowing that they were to be used in his brewery, contrary to law, and it was held that he could not recover the price. It was also followed by Abbott, C.J., in Cannan *v.* Bryce,[4] where it was held that money lent to a man to enable him to

[1] 1 Bosanquet & Puller, 551, 556.
[2] Story's Conflict of Laws, § 253.
[3] 1 Maule & Selwyn, 593.
[4] 3 Barnewall & Alderson, 179.

settle his losses on an illegal stockjobbing transaction, could not be recovered back. Said the Chief Justice : "If it be unlawful in one man to pay, how can it be lawful for another to furnish him with the means of payment? . . . The means were furnished with a full knowledge of the object to which they were to be applied, and for the express purpose of accomplishing that object." In that case the lender had no interest whatever in the unlawful transaction, and was only connected with it, as Hunter & Oakes were in this case, by knowing the object for which the money was borrowed. These cases were followed by the Court of Errors of New York, in the case of De Groot *v.* Van Duzer.[1] Walworth, C., in that case, observes, that, "those cases in which an independent contract has been held void from a mere knowledge of the fact of the illegal end in view, proceed upon the ground that the party having such knowledge intended to aid the illegal object at the time he made the contract."

There are cases to the contrary ; but they are either cases where the unlawful act contemplated to be done was merely *malum prohibitum*, or of inferior criminality ; or cases in which the unlawful act was already committed, and the loan was an independent contract, made, not to enable the borrower to commit the act, but to pay obligations which he had already incurred in committing it. Of the latter class was the case of Armstrong *v.* Toler ;[2] of the former, those of Hodgson *v.* Temple,[3] and others cited in the argument. In Hodgson *v.* Temple, where a buyer of spirituous liquors was known to be carrying on a rectifying distillery and a retail liquor shop at the same time, contrary to law, the vendor of the spirits was held entitled to recover the price. Sir James Mansfield said : "The merely selling goods, knowing that the buyer will make an illegal use of them, is not sufficient to deprive the vendor of his just right of payment ; but to effect that, it is necessary that the vendor should be a sharer in the illegal transaction."

This seems to have been the view taken by the judge who tried this cause below, and which he applied to this case. In our judgment it is altogether too narrow a view of the responsibility of a vendor in such a case as the present. Where to draw the precise line between the cases in which the vendor's knowledge of the purchaser's intent to make an unlawful use of the goods will vitiate the contract, and those in which it will not, may be difficult. Perhaps it cannot be done by exact definitions. The whole doctrine of avoiding contracts for illegality and immorality is founded on public policy. It is certainly

[1] 20 Wendell, 390. [2] 11 Wheaton, 258. [3] 5 Taunton, 181.

contrary to public policy to give the aid of the courts to a vendor who knew that his goods were purchased, or to a lender who knew that his money was borrowed, for the purpose of being employed in the commission of a criminal act, injurious to society or to any of its members. This is all that we mean to decide in this case.

Judgment reversed, and a new trial ordered.

ANHEUSER-BUSCH BREWING ASSOCIATION *v.* EMMA MASON.

IN THE SUPREME COURT OF MINNESOTA, SEPTEMBER 23, 1890.

[*Reported in* 44 *Minnesota* 318.]

APPEAL by plaintiff from an order of the Municipal Court of St. Paul, refusing a new trial after a dismissal ordered at the trial. The action was to recover a balance of $122 for goods sold and delivered.

John L. Townley for appellant.

Johns, Michael & Johns for respondent.

COLLINS, J. This action was brought to recover a balance claimed to be due plaintiff (a corporation) for and on account of bottle beer sold to the defendant. The answer alleged that at the time of the sale defendant, as plaintiff well knew, was the keeper of a house of prostitution; that plaintiff sold the beer expressly for use and dispensation in and for carrying on and maintaining said house; and that when sold and delivered it was agreed between plaintiff and defendant that the beer was to be paid for out of the profits accruing to the latter from her unlawful occupation. On the trial, defendant made no attempt to establish the defence as pleaded, but relied wholly upon admissions made by plaintiff's agent, when testifying, that he did not know just what was done with the beer, but that, when selling it to defendant, he supposed she would sell or use it in her brothel. On this admission, as we understand the record, the case was dismissed by the trial court.

While it would seem quite unnecessary so to do, it may be well to call attention at the outset to the fact that this case should not be confounded with one wherein the vendor in selling his goods has violated a statute requiring him to first procure a license, as was that of Solomon *v.* Dreschler, 4 Minn. 197 (278). Nor is it one in which the vendor has sold a proper

article of merchandise in a legitimate way, but with the knowledge that it is to be disposed of by the vendee in direct violation of the law; for illustration, a sale of spirituous liquors by a qualified wholesale dealer, with full knowledge that the purchaser intended to retail the same in defiance of a prohibitory law, or without first obtaining the required license to sell; or a sale of poison by a druggist, knowing that it was intended for use in committing murder. The illegality of the transaction now under discussion occurs, if at all, in a matter collateral to the sale, incidentally implicated with it, and out of considerations of public policy solely. It has been well said that the consideration essential to a valid contract must not only be valuable, but it must be lawful, not repugnant to law or sound policy or good morals. *Ex turpi contractu actio non oritur.* The reports, both English and American, are replete with cases in which contracts of all descriptions have been held invalid on account of an illegality of consideration, illustrations of the acknowledged rule that contracts are unlawful and non-enforceable when founded on a consideration *contra bonos mores*, or against the principles of sound policy, or founded in fraud, or in contravention of positive provisions of a statute. The utmost difficulty has been experienced by the courts in applying the general rule, however, and an examination of the authorities wherein an application has been necessary will convince the reader that the conclusions reached and announced in the English tribunals are beyond reasonable reconciliation. This want of harmony, and that more uniform and consistent results have obtained in this country, is thoroughly demonstrated in two cases with us (Tracy *v.* Talmage—first opinion by Selden, J., and the second, on motion for rehearing, by Comstock, J.—14 N. Y. 162, and Hill *v.* Spear, 50 N. H. 253), in each of which the principal cases in both countries are ably and carefully reviewed, and the law applicable to the question involved in this action stated in accordance with the great weight of authority in the United States as well as in England. These cases, now regarded as leading on this side of the Atlantic, announce the rule to be that mere knowledge by a vendor of the unlawful intent of a vendee will not bar a recovery upon a contract of sale, yet, if, in any way, the former aids the latter in his unlawful design to violate a law, such participation will prevent him from maintaining an action to recover. The participation must be active to some extent. The vendor must do something in furtherance of the purchaser's design to transgress, but positive acts in aid of the unlawful purpose are sufficient, though slight. While it is certain that a contract is void

when it is illegal or immoral, it is equally as certain that it is not void simply because there is something immoral or illegal in its surroundings or connections. It cannot be declared void merely because it tends to promote illegal or immoral purposes. The American text-writers generally admit this to be the prevailing rule of law in the States upon this point. 1 Whart. Cont. § 343 ; Hill. Sales, 490, 492 ; 1 Pars. Cont. 456 ; Story, Cont. (5th ed.) § 671 ; Story, Confl. Law, § 253 ; Greenh. Pub. Pol. 589. However, it has been suggested that this statement is subject to the modification that the unlawful use of which the vendor is advised must not be a felony or crime involving great moral turpitude. See Hanauer *v.* Doane, 12 Wall. 342 ; Tatum *v.* Kelley, 25 Ark. 209 ; Milner *v.* Patton, 49 Ala. 423 ; Lewis *v.* Latham, 74 N. C. 283 ; Bickel *v.* Sheets, 24 Ind. 1 ; Steele *v.* Curle, 4 Dana, 381.

Without expressly endorsing the result in some of the cases, or all that has been said by the courts in their opinions when making an application to the facts then in hand, of the rule so exhaustively examined and approved in Tracy *v.* Talmage, and Hill *v.* Spear, *supra*, we cite, in support of the propositions therein contended for, and upon which we rest a reversal of the order of dismissal made by the Court below, Armstrong *v.* Toler, 11 Wheat. 258 ; Green *v.* Collins, 3 Cliff. 494 ; Dater *v.* Earl, 3 Gray, 482 ; Armfield *v.* Tate, 7 Ired. 258 ; Read *v.* Taft, 3 R. I. 175 ; Cheney *v.* Duke, 10 Gill & J. 11 ; Kreiss *v.* Seligman, 8 Barb. 439 ; Michael *v.* Bacon, 49 Mo. 474 ; Brunswick *v.* Valleau, 50 Iowa, 120 ; Webber *v.* Donnelly, 33 Mich. 469 ; Bishop *v.* Honey, 34 Tex. 245 ; Wright *v.* Hughes, 119 Ind. 324 (21 N. E. Rep. 907) ; Feineman *v.* Sachs, 33 Kan. 621 (7 Pac. Rep. 222) ; Rose *v.* Mitchell, 6 Colo. 102 ; Banchor *v.* Mansel, 47 Me. 58 ; Henderson *v.* Waggoner, 2 Lea, 133 ; Gaylord *v.* Soragen, 32 Vt. 110 ; Mahood *v.* Tealza, 26 La. Ann. 108 ; Delavina *v.* Hill (N. H.) 19 Atl. Rep. 1000.

The agent who made the sales, upon whose testimony the defendant saw fit to rest her case, knew that she was engaged in the unlawful business of keeping a house of ill fame, and admits also that he supposed the beer would be used or sold in her place of business. Nothing further was shown which connected the plaintiff or its agent with any violation of the law. The burden was upon the defendant to show that an enforcement of the contract would be in violation of the settled policy of the State, or injurious to the morals of its people, and no court should declare a contract illegal on doubtful or uncertain grounds. And it may be difficult to distinguish between the cases in which the vendor, with knowledge of the vendee's un-

lawful purpose, does not become a confederate, and those wherein he aids and assists to an extent sufficient to vitiate the sale ; but this difficulty is not apparent in the case at bar.

Order reversed.

CHESTER H. GRAVES AND OTHERS *v.* WALTER B. JOHNSON.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, MAY 6, 1892.

[*Reported in* 156 *Massachusetts* 211.]

HOLMES, J. This is an action for the price of intoxicating liquors. It is found that they were sold and delivered in Massachusetts by the plaintiffs to the defendant, a Maine hotel keeper, with a view to their being resold by the defendant in Maine, against the laws of that State. These are all the material facts reported ; and these findings we must assume to have been warranted, as the evidence is not reported, so that no question of the power of Maine to prohibit the sales is open. The only question is whether the facts as stated show a bar to this action.

The question is to be decided on principles which we presume would prevail generally in the administration of the common law in this country. Not only should it be decided in the same way in which we should expect a Maine court to decide upon a Maine contract presenting a similar question, but it should be decided as we think that a Maine court ought to decide this very case if the action were brought there. It is noticeable, and it has been observed by Sir F. Pollock, that some of the English cases which have gone farthest in asserting the right to disregard the revenue laws of a country other than that where the contract is made and is to be performed, have had reference to the English revenue laws. Holman *v.* Johnson, 1 Cowp. 341. Pollock, Con. (5th ed.) 308. See also M'Intyre *v.* Parks, 3 Met. 207.

The assertion of that right, however, no doubt was in the interest of English commerce (Pellecat *v.* Angell, 2 Cr., M. & R. 311, 313), and has not escaped criticism (Story, Confl. Laws, §§ 257, 254, note, 3 Kent. Com. 265, 266, and Wharton, Confl. Laws, § 484), although there may be a question how far the actual decisions go beyond what would have been held in the case of an English contract affecting only English laws. See

Hodgson *v.* Temple, 5 Taunt. 181 ; Brown *v.* Duncan, 10 B. & C. 93, 98, 99 ; Harris *v.* Runnels, 12 How. 79, 83, 84.

Of course it would be possible for an independent state to enforce all contracts made and to be performed within its territory, without regard to how much they might contravene the policy of its neighbors' laws. But in fact no State pursues such a course of barbarous isolation. As a general proposition, it is admitted that an agreement to break the laws of a foreign country would be invalid. Pollock, Con. (5th ed.) 308. The courts are agreed on the invalidity of a sale when the contract contemplates a design on the part of the purchaser to resell contrary to the laws of a neighboring State, and requires an act on the part of the seller in furtherance of the scheme. Waymell *v.* Reed, 5 T. R. 599 ; Gaylord *v.* Soragen, 32 Vt. 110 ; Fisher *v.* Lord, 63 N. H. 514 ; Hull *v.* Ruggles, 56 N. Y. 424, 429.

On the other hand, plainly, it would not be enough to prevent a recovery of the price that the seller had reason to believe that the buyer intended to resell the goods in violation of law ; he must have known the intention in fact. Finch *v.* Mansfield, 97 Mass. 89, 92 ; Adams *v.* Coulliard, 102 Mass. 167, 173. As in the case of torts, a man has a right to expect lawful conduct from others. In order to charge him with the consequences of the act of an intervening wrongdoer, you must show that he actually contemplated the act. Hayes *v.* Hyde Park, 153 Mass. 514, 515, 516.

Between these two extremes a line is to be drawn. But as the point where it should fall is to be determined by the intimacy of the connection between the bargain and the breach of the law in the particular case, the bargain having no general and necessary tendency to induce such a breach, it is not surprising that courts should have drawn the line in slightly different places. It has been thought not enough to invalidate a sale, that the seller merely knows that the buyer intends to resell, in violation even of the domestic law. Tracy *v.* Talmage, 4 Kernan, 162 ; Hodgson *v.* Temple, 5 Taunt. 181. So of the law of another State. M'Intyre *v.* Parks, 3 Met. 207 ; Sortwell *v.* Hughes, 1 Curt. C. C. 244 ; Green *v.* Collins, 3 Cliff. 494 ; Hill *v.* Spear, 50 N. H. 253. (Dater *v.* Earl, 3 Gray, 482, is a decision on New York law.)

But there are strong intimations in the later Massachusetts cases that the law on the last point is the other way. Finch *v.* Mansfield, 97 Mass. 89, 92 ; Suit *v.* Woodhall, 113 Mass. 391, 395. And the English decisions have gone great lengths in the case of knowledge of intent to break the domestic law. Pearce *v.*

Brooks, L. R. 1 Ex. 213 ; Taylor *v.* Chester, L. R. 4 Q. B. 309, 311.

However this may be, it is decided that when a sale of intoxicating liquor in another State has just so much greater proximity to a breach of the Massachusetts law as is implied in the statement that it was made with a view to such a breach, it is void. Webster *v.* Munger, 8 Gray, 584 ; Orcutt *v.* Nelson, 1 Gray, 536, 541 ; Hubbell *v.* Flint, 13 Gray, 277, 279 ; Adams *v.* Coulliard, 102 Mass. 167, 172, 173. Even in Green *v.* Collins and Hill *v.* Spear, the decision in Webster *v.* Munger seems to be approved. See also Langton *v.* Hughes, 1 M. & S. 593 ; M'Kinnell *v.* Robinson, 3 M. & W. 434, 441 ; White *v.* Buss, 3 Cush. 448. If the sale would not have been made but for the seller's desire to induce an unlawful sale in Maine, it would be an unlawful sale on the principles explained in Hayes *v.* Hyde Park, 153 Mass. 514, and Tasker *v.* Stanley, 153 Mass. 148. The overt act of selling, which otherwise would be too remote from the apprehended result, an unlawful sale by some one else, would be connected with it, and taken out of the protection of the law by the fact that that result was actually intended. We do not understand the judge to have gone so far as we have just supposed. We assume that the sale would have taken place, whatever the buyer had been expected to do with the goods. But we understand the judge to have found that the seller expected and desired the buyer to sell unlawfully in Maine, and intended to facilitate his doing so, and that he was known by the buyer to have that intent. The question is whether the sale is saved by the fact that the intent mentioned was not the controlling inducement to it. As the connection between the act in question, the sale here, and the illegal result, the sale in Maine—the tendency of the act to produce the result—is only through the later action of another man, the degree of connection or tendency may vary by delicate shades. If the buyer knows that the sale is made only for the purpose of facilitating his illegal conduct, the connection is at the strongest. If the sale is made with the desire to help him to his end, although primarily made for money, the seller cannot complain if the illegal consequence is attributed to him. If the buyer knows that the seller, while aware of his intent, is indifferent to it, or disapproves of it, it may be doubtful whether the connection is sufficient. Compare Commonwealth *v.* Churchill, 136 Mass. 148, 150. It appears to us not unreasonable to draw the line as it was drawn in Webster *v.* Munger, and to say that, when the illegal intent of the buyer is not only known to the seller, but encouraged by the sale as just ex-

plained, the sale is void. The accomplice is none the less an accomplice because he is paid for his act. See Commonwealth *v.* Harrington, 3 Pick. 26.

The ground of the decision in Webster *v.* Munger is, that contracts like the present are void. If the contract had been valid, it would have been enforced. Dater *v.* Earl, 3 Gray, 482 ; M'Intyre *v.* Parks, 3 Met. 207. As we have said or implied already, no distinction can be admitted based on the fact that the law to be violated in that case was the *lex fori*. For if such a distinction is ever sound, and again if the same principles are not always to be applied, whether the law to be violated is that of the State of the contract or of another State (see Tracy *v.* Talmage, 4 Kernan, 162, 213), at least the right to contract with a view to a breach of the laws of another State of this Union ought not to be recognized as against a statute passed to carry out fundamental beliefs about right and wrong, shared by a large part of our own citizens. Territt *v.* Bartlett, 21 Vt. 184, 188, 189. In the opinion of a majority of the Court, this case is governed by Webster *v.* Munger, and we believe that it would have been decided as we decide it, if the action had been brought in Maine instead of here. Banchor *v.* Mansel, 47 Maine, 58.

Exceptions sustained.

A. J. Pratt for the plaintiffs.

C. C. Powers for the defendant.

M'KINNELL *v.* ROBINSON.

In the Exchequer, Easter Term, 1838.

[*Reported in* 3 *Meeson & Welsby* 434.]

Assumpsit. The second and third counts of the declaration were in *indebitatus assumpsit* for money lent, and for money found to be due upon an account stated. To these counts the defendants pleaded, that the said sum of £30 in the second count mentioned was borrowed by the defendant, as the plaintiff then well knew, and was knowingly lent by the plaintiff to the defendant in a certain common gambling-room, in and parcel of a certain messuage and premises, for the purpose of the defendant's illegally playing and gaming therewith, at and in the said gambling-room, at a certain illegal game, to wit, the game of hazard, contrary to the statute in such case made and provided ; and that the account in the last count mentioned

was had and stated of and concerning the said sum of £30 in the second count mentioned, also borrowed and lent as aforesaid, and for and in respect of no other debts or moneys whatever. Verification.

Demurrer, assigning for cause, that the several matters in the last plea pleaded and set forth afford no answer to the second and last counts, inasmuch as money lent for the purpose of gaming with, as in the last plea mentioned, and money found to be due on an account stated respecting money so lent, is recoverable by action at law.

Crompton, in support of the demurrer.

Wightman, *contra*.

The judgment of the Court was now delivered by

Lord Abinger, C.B. (After stating the pleadings.) As the plea states, that the money for which the action is brought, was lent for the purpose of illegally playing and gaming therewith, at the illegal game of "hazard," this money cannot be recovered back, on the principle, not for the first time laid down, but fully settled, in the case of Cannan *v.* Bryce, 3 B. & Ald. 179.[1] This principle is that the repayment of money, lent for the express purpose of accomplishing an illegal object, cannot be enforced; and there is no doubt but that it is illegal for any person to play at hazard by the 12 Geo. 2, ch. 28, §§ 2, 3, and 18 Geo. 2, ch. 34, § 2, which imposes a penalty of £50 on all and every person who shall play at that game. But, it is contended, that the authorities are so strong in favor of the maintenance of the action, that we ought not to decide against them. Those relied upon by the plaintiff are the cases of Barjeau *v.* Walmsley, 2 Strange, 1249; Robinson *v.* Bland, 1 W. Black. 260, 2 Burr. 1077, and Wettenhall *v.* Wood, 1 Esp. 16. The first of these cases was decided upon the 9 Anne, ch. 14, only. The action was not for money lent for the purpose of playing at a game expressly prohibited by the statute 12 Geo. 2, or any other act; but for money lent exceeding £10 for the purpose of playing with it; and the propriety of the decision, upon the construction of the statute of Anne itself, may well be questioned, as there is much weight in the observation made in the subsequent case of Young *v.* Moore, 2 Wils. 67, that as the statute has made all securities for money won at play void, *a fortiori*, all parol contracts of that sort are void. In Robinson *v.* Bland, also, the money was not lent to play with at an illegal game; and in Wettenhall *v.* Wood, Lord Kenyon, at *nisi prius*, held that money lent to play with at a common gambling house could be recovered back, his Lordship advert-

[1] E. C. L. R. Vol. V.

ing only to the statute of 9 Anne, ch. 14, and not having in view the provisions of 12 & 18 Geo. 2, by which all play at certain games is prohibited, and they who play rendered liable to penalties.

The case of Alcinbrook *v.* Hall, 2 Wilson, 309, was also cited for the plaintiff. It was an action for a sum exceeding £10, paid by the plaintiff for the defendant, for a lost wager at a horse-race, and is like the case of Barjeau *v.* Walmsley ; it was held that it was recoverable back, notwithstanding the statute 9th Anne. It may be doubted, since the case of Cannan *v.* Bryce, whether this case would now be supported ; at any rate, the present differs from it, as all play whatever at the game of hazard is prohibited.

We therefore think, that, notwithstanding these authorities, the money lent cannot be recovered ; for it is lent for the express purpose of a violation of the law, and enabling the borrower to do a prohibited act ; and the principle is now distinctly laid down in the case above cited, and may be considered as finally settled, that money so lent cannot be recovered.

Judgment for the defendant.

DAVID H. HULL, APPELLANT, *v.* SAMUEL N. RUGGLES ET AL., RESPONDENTS.

IN THE COURT OF APPEALS OF NEW YORK, APRIL 28, 1874.

[*Reported in* 56 *New York Reports* 424.]

APPEAL from order of the General Term of the Supreme Court in the fourth judicial department, reversing a judgment in favor of plaintiff entered upon the report of a referee and granting a new trial.

The action was for goods sold and delivered. The defence was that the goods, which consisted of what is known as prize candy packages with some articles of silverware, were intended to be used as a lottery, of which plaintiff had notice, and that he prepared the goods for that purpose.

The referee found the following facts : That, on July 27th, 1871, the defendants ordered of the plaintiff 300 packages of candy and 60 pieces of silverware, which the plaintiff delivered. The defendants promised to pay the plaintiff therefor the sum of $70 on August 27th, 1871 ; that 60 of said packages contained tickets, and each of said tickets had printed thereon the name of one of the said pieces of silverware ; that said defend-

ants disposed of said goods, or a part thereof, as follows : The packages of candy were exposed for sale with said silverware in view, and any person proposing to purchase one or more of said packages was informed that if he bought a package containing one of said tickets he would be entitled to the piece of silverware corresponding with the name on the ticket ; that none of said tickets were visible, all being concealed in the packages ; that in this manner the defendants sold a part of said packages of candy, and distributed a part of said articles of silverware ; that said candy and silverware together were worth the sum of $70, but that said packages of candy alone were not worth more than the sum of $15 ; that the object of the defendants in so disposing of said goods was to sell said packages for more than their intrinsic value by offering to the purchaser thereof a chance in the distribution, by lot, of said silverware ; that the plaintiff had reasonable cause to believe, when he sold said goods to the defendants, that they intended to use them in violation of the statutes against lotteries ; and, as conclusions of law, he found that the bare knowledge of the plaintiff that the defendants intended to use said goods unlawfully is not sufficient to vitiate the contract of sale and render it illegal and void, and that the plaintiff was entitled to judgment.

W. Sanders for the appellant.

Peter H. Van Auken for the respondents.

FOLGER, J. The Revised Statutes (1 R. S. p. 665, § 26) declare that every lottery, game, or device of chance in the nature of a lottery, by whatsoever name it may be called, other than such as have been authorized by law, shall be deemed unlawful. It must have been set on foot for the purpose of disposing of property. People *v.* Payne, 3 Denio, 88. It cannot be doubted but that the purpose of the defendants, in contracting for the goods sold to them by the plaintiff, was to dispose of them to the public at more than their real value. This was to be effected, by the incitement and temptation held out to each purchaser, that while he paid more than the real value of the package that he bought, he also bought the chance of obtaining another article much exceeding in value the price paid. He would, it is true, get some real value, but so much less than the price that he paid, that he would not have been likely to pay that sum for it, but for the chance, and the hope excited by the chance, that he might also get therefor, another article of greater value than the amount paid. This was a lottery within the meaning of the statute. It was to set up chattels, to be distributed by lot, to any person who should have paid a valuable

consideration for the chance of obtaining such chattels. *Id.* § 1. It was a lottery, or device of chance in the nature of a lottery. § 26. It is directly within the definition of Worcester: "A hazard in which sums are ventured for the chance of obtaining a greater value."

Where a pecuniary consideration is paid, and it is determined by lot or chance, according to some scheme held out to the public, what and how much he who pays the money is to have for it, that is a lottery. State *v.* Clarke, 33 N. H. 329; Governors, etc., *v.* Am. Art. Union, 7 N. Y. 228. It was unauthorized by law. It therefore fell within the prohibition of the statute. § 26.

Now is there any doubt but that the plaintiff sold and delivered the goods to the defendants that they might be thus disposed of? The referee finds that they were so put up by the plaintiff as that each package of lesser value either had concealed in it a ticket, or had in it no ticket, on which was the name of some one of the articles of greater value; that these packages of lesser value were exposed for sale with the packages of greater value in view; that each purchaser of a package of lesser value was made to know, before his purchase was made by him, that if he by chance got a package in which was concealed a ticket, he was also entitled to an article from those of greater value, which was named upon that ticket. The referee also finds that the plaintiff had reasonable cause to believe that when he sold the goods to the defendants, they intended to use them in violation of the statutes against lotteries. Upon these findings of fact, his judgment for the plaintiff cannot be sustained, unless he is right in his conclusion of law: "That the bare knowledge of the plaintiff that the defendants intended to use said goods unlawfully is not sufficient to vitiate the contract of sale, and render it illegal and void."

We are not left to the rules of the common law alone, to determine whether this conclusion of law is correct. The statutes against lotteries have provisions touching the subject. Section 38 of the Revised Statutes above cited (1 R. S. 668, § 38) declares that every sale of any goods, for the purpose of aiding in a lottery, is void and of no effect. It is difficult to perceive how a sale of goods so packed and arranged as to enable the purchaser, without alteration or readjustment of them, to carry out a scheme, which when accomplished is an unlawful lottery; and sold thus with knowledge, or with reasonable cause for belief, that the purchaser by the disposal to the public of the goods thus arranged intended to violate the statutes against lotteries, is not a sale for the purpose of aiding in such lottery.

It cannot be otherwise. The sale by the plaintiff to the defendants was to aid in carrying on an unlawful lottery, and was void. As the sale was unlawful and void, the contract of sale was the same and cannot be enforced. It is in violation of a penal and prohibitory statute, and the Court cannot lend the aid of the law to carry it out and enforce it in favor of a party to it.

Nor does this conclusion rest alone upon the prohibition of § 38 above cited. The plaintiff cites, as an authority in his favor, Tracy *v.* Talmadge, 14 N. Y. 162. That case does hold that mere knowledge by the vendor, that the purchaser intends to make an unlawful use of the property, is not a defence to an action for its price. That is perhaps all that was necessary to decide in that case for the determination of the questions there involved. But it is also said there, that if the vendor, with knowledge of the intent of the purchaser, do anything beyond making the sale, to aid or further the unlawful design, he cannot recover for the property. And in the opinion given there are cited the not unfamiliar English cases, in which it is held, that if goods be bought with the purpose of smuggling them into England, though the vendor have knowledge of the purpose, he may recover the price of the goods if he do nothing to aid in carrying out the design (Holman *v.* Johnson, Cowp. 341) ; but if he has so packed the goods as to facilitate the smuggling, he is regarded as *particeps criminis* and cannot recover. Biggs *v.* Lawrence, 3 T. R. 454 ; Clugas *v.* Penaluna, 4 T. R. 466 ; Waymell *v.* Reed, 5 T. R. 599.

The acts of the plaintiff bring him within the principle established by those authorities. We know of no authority in this State which is in conflict with that principle.

The order appealed from should be affirmed and judgment rendered for defendants on the stipulation.

All concur.

Order affirmed and judgment accordingly.

FEATHERSTON *v.* HUTCHINSON.

In the King's Bench, Michaelmas Term, 1591.

[*Reported in Croke, Elizabeth*, 199.]

Assumpsit. And declares that whereas the plaintiff had taken the body of one H. in execution at the suit of J. S. by virtue of a warrant directed to him as special bailiff ; the defendant, in consideration he would permit him to go at large, and of 2*s.* to

the defendant paid, etc., promised to pay the plaintiff all the money in which H. was condemned. Upon *non assumpsit* it was found for the plaintiff. It was moved in arrest of judgment, that the consideration is not good, being contrary to the statute of 23 Hen. 6, ch. 10, and that a promise and obligation was all one. And though it be joined with another consideration of 2*s.*, yet being void and against the statute for part, it is void in all. See Dive et Manningham's Case, in Comment. f. 60.

JOHN FOLEY ET AL., APPELLANTS, *v.* GILBERT M. SPEIR ET AL., RESPONDENTS.

IN THE COURT OF APPEALS OF NEW YORK, NOVEMBER 24, 1885.

[*Reported in* 100 *New York Reports* 552.]

APPEAL from judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, entered upon an order affirming a judgment of the General Term of the Marine Court of said city, which affirmed a judgment in favor of defendants, entered upon an order dismissing plaintiffs' complaint on trial.

The complaint in this action alleged, in substance, that the plaintiffs, together with the defendant Averill, were the executive committee of a political organization in the city of New York known as the "Reform Association," and that the defendant Speir was a candidate for the office of judge of the Superior Court of the city of New York at the election held in November, 1873. That in October, 1873, in consideration of certain expenditures to be made by said executive committee in defraying the expenses for printing and the circulation of votes, handbills and other papers, and for conveying sick, poor, and infirm electors to the polls, the said Speir promised to pay to such committee the sum of $2000 as his proportion and contribution of such expenses. That said committee, in consideration of the "promises," paid for the above purposes $8601.63 and upward, and said Speir by the terms of his said promise became indebted to said committee in said sum of $2000.

The material facts are stated in the opinion.

Samuel Hand for appellants.

A. J. Vanderpoel for respondents.

DANFORTH, J. So far as appears the plaintiffs in October, 1873, composed a body styled "The Reform Association,"

which was brought into being and made complete in all its parts, both of membership and officers, when they "came together and called themselves 'its executive committee.'" Its object was to promote the election of such candidates for office, irrespective of political considerations, as should be recommended by the association. Preparatory thereto they hired rooms and made an estimate of such expenses as would probably be required for that purpose at the then coming elections. A schedule of items was prepared, and of the aggregate $2000 "set down" thereon to the defendant as his share. This was shown to him the day after his nomination for the office of judge, and the evidence is that after looking it over, and some conversation, he said "it was all right; I will pay it." Expenses were incurred and money paid out by the plaintiffs on account thereof. This action was commenced in October, 1879, to recover the above sum of $2000.

The answer of the defendant put the material allegations of the complaint in issue, and upon trial, after evidence had been given by the plaintiffs as to the matters above referred to, the kind and character of the services rendered, and the objects for which expenses were in fact incurred, the complaint was dismissed upon the ground that the contract and expenditures were in violation of the statutes which make it unlawful for a candidate for any elective office to contribute money to promote the election of himself or other person, except as therein stated. Laws of 1842, ch. 130; ch. 6, tit. 7, § 6.

No other question is presented upon this appeal, and in regard to it we concur in the conclusion reached by the trial court and affirmed by the General Term. The paper or schedule submitted to the defendant was not left with him, but retained by the plaintiffs and not produced upon the trial. They, however, testified, Foley saying, "we went on and ordered the printing and the other necessary work, and which we accomplished, we employed the necessary clerks and men to attend to the boxes, we ordered the printing and folding of ballots, and we performed all the necessary work, for which we paid out that amount of money for him and in fact more." "In all, the expenses were between $8000 and $10,000." This included $600 rent for rooms at a hotel, and it also formed part of the expenses to the payment of which the defendant agreed to contribute. Besides these there were also expenses in maintaining the rooms and running the association, and money paid for the general purpose of assisting the election of their candidates, but in what particular way, or for what, the plaintiff could not remember.

Another plaintiff, McLaren, referring to the same interview with the defendant, says : "The matter was talked over and a schedule was shown the judge of the probable expenses, and the amount set down for the judge as his share of them was $2000 ; and my recollection of that conversation is that he said it was all right, and that he would pay it. Q. Toward what purpose ? A. Toward the expenses of the association. Q. State what the expenses were for ? A. The expenses to be incurred were for printing ballots, supplying one man at each polling district with those ballots for election, and for boxes to be placed in each district; I think there were some five hundred in all—the expenses were to include advertising, clerk hire, room hire, postage stamps—everything incidental to the business of an election." He also testified that the plaintiffs "had a book for each assembly district ; each man took a district and enrolled the names of the voters in that district ; that occasioned a great deal of work, and a considerable portion of these expenses ; we had a book of each assembly district, and we took the name of each voter, his occupation, and residence ; we sent out circulars saying that this enrolment would take place, and the parties would be waited upon."

The plaintiffs had been paid by other candidates on account of these expenses, but there remained unpaid a balance of $2842.09.

Both the statute and the principles settled in Jackson *v.* Walker, 5 Hill, 27, are decisive against the appellants. In that case the law upon the subject, after full discussion by learned and able counsel, was stated in the opinion of the Court in a manner to which we think no just exception can be taken. It may have been an extreme case, but to it rules of construction were applied from which there should be no departure. The act of 1829 (ch. 373) was entitled "An act to preserve the purity of elections." With two specified exceptions it was declared to be unlawful to contribute money to promote an election of any particular person or ticket. The exceptions were (1) for defraying the expenses of printing ; (2) the circulation of votes, handbills, and other papers. A third was added for conveying poor, sick, or infirm electors to the polls. These provisions were re-enacted, and now form part of the act of 1842, *supra*. Everything else is forbidden. The complaint recognizes and states these three things as the cause of action. It is very clear the evidence goes beyond it. The agreement as proven includes the rent of rooms—the headquarters of this self-appointed association for promoting the interest of particular candidates —and so comes within the very letter of the case cited. So is

it within the express condemnation of the statute, for it is not one of the excepted purposes. So generally the claim includes "anything incidental to the business of an election." One thing incidental to that event is "procuring the attendance of voters at the polls," and that is expressly prohibited. Statute, *supra*, § 6, subds. 3, 4. So, also, and for the purpose of procuring the election of the same candidates, was the payment of $1000 to one of the plaintiffs for his services in taking charge of the rooms and running the association. Upon the plaintiffs' showing the agreement included illegal and forbidden items. It would be difficult indeed to find a transaction which should present more elements of political corruption than the one devised by the plaintiffs. They present themselves to the public under the specious and attractive guise of a reform association, while they are in fact actuated by a desire for pecuniary profit, and are indemnified against expenses which professedly are incurred in the cause of good government, by the obligations of individuals who are personally interested in the result. We think it is not only prohibited and made criminal by statute, but void because contrary to public policy and the welfare of the community.

The learned counsel for the appellants argues, however, that as more than $2000 was in fact expended for permitted and lawful purposes, a recovery may be had for that, although other expenditures might not be allowed.[1] The plaintiffs have no such option. The agreement proved is an entire and single one—to pay as part of the whole expenses a single sum. It must stand, if at all, on the illegal as well as the legal considerations, for the good cannot be separated from the bad. If we could find distinct engagements for the separate items, those which are legal might be enforced, but that is not possible. Here is but one promise upon a consideration which is in part unlawful, both by statute and as against good morals. In Thalimer *v.* Brinkerhoff, 20 Johns. 397, it is laid down as a fundamental rule that all contracts which have for their object anything repugnant to the general policy of the law, or contrary to the provisions of a statute, are void, and it is held as well in law as in equity, *ex turpi contractu actio non oritur*.

I have not overlooked Hurley *v.* Van Wagner, 28 Barb. 112, nor Sizer v. Daniels, 66 Barb. 432, cited by the appellants, but upon the question raised by this appeal, find nothing to make us doubt the correctness of the construction above given to the statute. In both the circumstances calling for decision were so unlike those now before us, that the judgment formed upon

[1] Only so much of the opinion is given as relates to this question.—Ed.

them cannot be regarded as conflicting with the one under review.

It should, therefore, be affirmed.

All concur.

Judgment affirmed.

ROBERT BISHOP *v.* ELISHA L. PALMER AND OTHERS.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, APRIL 6, 1888.

[*Reported in* 146 *Massachusetts* 469.]

CONTRACT. Writ dated November 1st, 1886. The first count of the declaration alleged that the defendants owed the plaintiff $2500 for breach of a written agreement signed by the parties and annexed thereto, the material parts of which were as follows :

" This agreement, made this sixteenth day of March, A.D. 1886, by and between Robert Bishop, of Boston in the Commonwealth of Massachusetts, party of the first part, and Elisha L. Palmer, Frank L. Palmer, Edward A. Palmer, and George S. Palmer, copartners together, doing business under the firm name and style of Palmer Brothers, at Montville in the State of Connecticut, parties of the second part ; and the Massasoit Manufacturing Company, a corporation doing business at Fall River in the Commonwealth of Massachusetts, party of the third part, witnesseth :

" That whereas said party of the first part is engaged in the business of manufacturing and selling bedquilts and comfortables, and is also engaged in the business of buying, selling, and dealing generally in cotton waste ; and whereas he is desirous of selling out his business as a manufacturer of bedquilts and comfortables, together with all his plant, machinery, and stocks, manufactured and unmanufactured, now on hand, and of wholly giving up and going out of said business for the next five years, and is also desirous of selling that part of his cotton waste business which is done or transacted in whole or in part in the city of Fall River, in said Commonwealth, and with any and all of the mills doing business in said city :

" Now therefore, in consideration of the premises, and of the sum of five thousand dollars ($5000) to be paid by the parties of the second and third parts in the manner and at the times hereinafter specified, the party of the first part hereby sells, assigns, transfers, and delivers unto the parties of the second

part his entire business plant and enterprise as a manufacturer of and dealer in bedquilts and comfortables, together with the good will of said business, and all and singular, the machinery, implements, and utensils used by him in said business, and constituting said manufacturer's plant. . . .

"And for the consideration aforesaid, said party of the first part hereby sells, assigns, transfers, and conveys to the party of the third part all that portion of his waste business which is transacted or done in the city of Fall River, in the Commonwealth of Massachusetts, with any and all corporations doing business in said city; and he hereby assigns and transfers to said party of the third part all his existing contracts, whether verbal or written, with any of such corporations, or with firms or persons, and all rights thereunder, including rights of renewal; and also the good will of his said business and trade with the corporations in said city of Fall River. This clause does not have reference to buying and selling from individuals. It being the intention of said party of the first part absolutely and completely to sell and transfer to said party of the third part his entire cotton waste business, trade, and dealings, and the exclusive right to deal and do a cotton waste business with and purchase cotton waste of any and all of said corporations, for the period of five years from the date hereof.

"And said party of the first part hereby, for himself, his executors, administrators, and assigns, covenants and agrees with said parties of the second and third parts, and each of them, and their executors, administrators, successors, and assigns respectively, that for and during the period of five years from the date hereof he will not either directly or indirectly, in his own name or in the name of any other person or persons, continue in, carry on, or engage in the business of manufacturing or dealing in bedquilts or comfortables, or of any business of which that may form any part.

"And he further covenants and agrees as aforesaid, that for and during said period he will not enter into the cotton waste business in said city of Fall River with any corporation, firm, or person located and doing business in said city; and especially that he will not, directly or indirectly, in his own name or in the name of any other person, buy, or influence, or procure other persons to buy, any cotton waste from said mills, in said city of Fall River, or belonging to or controlled by any corporation located in said city, and that he will not, either directly or indirectly, make any bid therefor, or influence any other person so to do, in connection with the waste business in said city, or the purchase of waste from such parties.

"And he further covenants and agrees that he will not buy or offer to buy of any person whatever the waste produced by the corporations known as the Granite Mills, Troy Cotton and Woollen Mills, Richard Borden Manufacturing Company, and Pocasset Manufacturing Company.

"And the said parties of the second and third parts, in consideration of the sale and delivery of said business, plant, and property, and said cotton waste business and contracts, and the faithful performance of the covenants and agreements herein made by the party of the first part, agree to purchase said business plant and property, and said cotton waste business, and to pay therefor to said party of the first part the sum of five thousand dollars in ten equal monthly instalments, the first five hundred dollars to be paid on the first day of July, 1886, and the remaining instalments on the first day of each month thereafter, until all are paid."

The declaration contained a second count, upon an account annexed, for the recovery of the same amount.

The defendants demurred to the declaration, assigning the following grounds of demurrer:

"1. That the allegations, matters, and facts set forth in said declaration, and in each count thereof, do not in law constitute a cause of action against these defendants, or either of them. 2. For the reason that the contract annexed to the plaintiff's declaration, a breach of which is set forth in the first count thereof as the cause of action relied on therein, and which contract is referred to in the second count of said declaration, for a breach of which the sums claimed in said second count purport to be due, is an unlawful contract and a contract in restraint of trade, is against public policy and void, and cannot be enforced at law. 3. That both counts appear to be for the same cause of action, and the cause of action set forth in each count arises under said contract for a breach thereof by the defendants in failing to pay the plaintiff the amount claimed in said counts; but it appears by said contract that one of the considerations for said payments was the covenants and agreements of the plaintiff therein not to manufacture or be interested in the manufacture or sale of bedquilts and comfortables, as therein set forth, anywhere whatever, and without any limitation as to place, during the period of five years therein named, and also the covenants and agreements of the plaintiff in said contract to the effect that he will not enter into competition with the Massasoit Company, one of the defendants, at Fall River, for the purchase of cotton waste, or bid therefor directly or indirectly against or in competition with said com-

pany for said waste ; all of which agreements, covenants, and considerations are illegal and void, in restraint of trade, and against public policy, and fraudulent, and said contract is illegal and void, in restraint of trade and contrary to public policy, and cannot be enforced by the plaintiff. 4. That it appears by said contract that the considerations of any and all the agreements and undertakings of the defendants therein, for a breach of which the plaintiff sues, are illegal and void, and that said contract is illegal and void, and in restraint of trade and contrary to public policy, and void."

The Superior Court sustained the demurrer, and ordered judgment for the defendants, and the plaintiff appealed to this Court.

W. Gaston & C. L. B. Whitney for the plaintiff.

R. D. Smith & H. E. Bolles for the defendants.

C. ALLEN, J. The defendants' promise which is declared on was made in consideration of the sale and delivery of the business, plant, property, and contracts of the plaintiff, and of his faithful performance of the covenants and agreements contained in the written instrument signed by the parties. The parties made no apportionment or separate valuation of the different elements of the consideration. The business, plant, property, contracts, and covenants were all combined as forming one entire consideration. There is no way of ascertaining what valuation was put by the parties upon either portion of it. There is no suggestion that there was any such separate valuation, and any estimate which might now be put upon any item would not be the estimate of the parties.

It is contended by the defendants that each one of the three particular covenants and agreements into which the plaintiff entered is illegal and void, as being in restraint of trade. It is sufficient for us to say that the first of them is clearly so ; it being a general agreement, without any limitation of space, that for and during the period of five years he will not either directly or indirectly continue in, carry on, or engage in the business of manufacturing or dealing in bedquilts or comfortables, or of any business of which that may form any part. Thus much is virtually conceded by the plaintiff, and so are the authorities. Taylor *v.* Blanchard, 13 Allen, 370 ; Dean *v.* Emerson, 102 Mass. 480 ; Morse Twist Drill Co. *v.* Morse, 103 Mass. 73 ; Alger *v.* Thacher, 19 Pick. 51 ; Oregon Steam Navigation Co. *v.* Winsor, 20 Wall. 64 ; Davies *v.* Davies, 36 Ch. D. 359 ; 2 Kent Com. 466, note *c* ; Met. Con. 232.

Two principal grounds on which such contracts are held to be void are, that they tend to deprive the public of the services

of men in the employments and capacities in which they may be most useful, and that they expose the public to the evils of monopoly. Alger *v.* Thacher, *ubi supra.*

The question then arises whether an action can be supported upon the promise of the defendants, founded upon such a consideration as that which has been described. As a general rule, where a promise is made for one entire consideration, a part of which is fraudulent, immoral, or unlawful, and there has been no apportionment made or means of apportionment furnished by the parties themselves, it is well settled that no action will lie upon the promise. If the bad part of the consideration is not severable from the good, the whole promise fails. Robinson *v.* Green, 3 Met. 159, 161 ; Rand *v.* Mather, 11 Cush. 1 ; Woodruff *v.* Wentworth, 133 Mass. 309, 314 ; Bliss *v.* Negus, 8 Mass. 46, 51 ; Clark *v.* Ricker, 14 N. H. 44 ; Woodruff *v.* Hinman, 11 Vt. 592 ; Pickering *v.* Ilfracombe Railway, L. R. 3 C. P. 235, 250 ; Harrington *v.* Victoria Graving Dock Co., 3 Q. B. D. 549 ; 2 Chit. Con. (11th Am. ed.) 972 ; Leake Com. 779, 780 ; Pollock Con. 321 ; Met. Con. 247.

It is urged that this rule does not apply to a stipulation of this character, which violates no penal statute, which contains nothing *malum in se*, and which is simply a promise not enforceable at law. But a contract in restraint of trade is held to be void because it tends to the prejudice of the public. It is therefore deemed by the law to be not merely an insufficient or invalid consideration, but a vicious one. Being so, it rests on the same ground as if such contracts were forbidden by positive statute. They are forbidden by the common law, and are held to be illegal. 2 Kent Com. 466 ; Met. Con. 221 ; 2 Chit. Con. 974 ; White *v.* Buss, 3 Cush. 448, 450 ; Hynds *v.* Hays, 25 Ind. 31, 36.

It is contended that the defendants, by being unable to enforce the stipulation in question, only lose what they knew or were bound to know was legally null ; that they have all that they supposed they were getting—namely, a promise which might be kept, though incapable of legal enforcement ; and that if they were content to accept such promise, and if there is another good and sufficient consideration, they may be held upon their promise. But this argument cannot properly extend to a case where a part of an entire and inseparable consideration is positively vicious, however it might be where it was simply invalid ; as in Parish *v.* Stone, 14 Pick. 198. The law visits a contract founded on such a consideration with a positive condemnation, which it makes effectual by refusing to support it, in whole or in part, where the consideration cannot be severed.

The fact that the plaintiff had not failed to perform his part of the contract does not enable him to maintain his action. An illegal consideration may be actual and substantial and valuable ; but it is not in law sufficient.

The plaintiff further suggests that, if the defendants were to sue him on this contract, they could clearly, so far as the question of legality is concerned, maintain an action upon all its parts, except possibly the single covenant in question. Mallan *v.* May, 11 M. & W. 653 ; Green *v.* Price, 13 M. & W. 695 ; S. C. 16 M. & W. 346. This may be so. If they pay to the plaintiff the whole sum called for by the terms of the contract, it may well be that they can call on him to perform all of his agreements except such as are unlawful. In such case, they would merely waive or forego a part of what they were to receive, and recover or enforce the rest. It does not, however, follow from this that they can be compelled to pay the sum promised by them, when a part of the consideration of such promise was illegal. They are at liberty to repudiate the contract on this ground ; and, having done so, the present action founded on the contract cannot be maintained ; and it is not now to be determined what other liability the defendants may be under to the plaintiff, by reason of what they may have received under the contract.

Judgment affirmed.

SIR ROGER KERRISON, KNT., *v.* COLE AND OTHERS, EXECUTORS, ETC., OF JOHN MANN.

IN THE KING'S BENCH, FEBRUARY 6, 1807.

[*Reported in* 8 *East* 231.]

THE plaintiff declared in covenant upon an indenture, made May 31st, 1793, between himself and the testator, whereby in consideration of £2500 advanced by the plaintiff to the testator, and for securing the repayment of it, the testator bargained and sold to the plaintiff the ship Triton, of Yarmouth, then trading to Newcastle ; the ship Hope, of Ely, then trading to Dantzic ; the ship Albicore, of London, then trading to London ; the sloop Squirrel, of London, then trading to London ; a moiety of the brig Friends, of London (describing all these vessels by their tonnage, etc.) ; and also three certain lighters (describing them), with a proviso for the indenture to be void upon payment by the testator, his executors, etc., of £2500 to

the plaintiff on August 31st ensuing the date. The indenture also contained an express covenant by the testator, for himself, his executors, etc., to pay to the plaintiff the said £2500 with interest, etc. The declaration concluded with alleging a breach by non-payment of the money. The plea, after craving oyer of the indenture, which was set forth in substance as in the declaration stated ; with covenants for the title of the testator, and for the quiet enjoyment of the plaintiff, and for further assurance ; pleaded that the plaintiff and the testator, at the time of making the indenture, were subjects of the king, and that the ships and lighters mentioned had been registered pursuant to the stat. 26 Geo. 3, ch. 60, and that certificates of registry of each of them had been granted pursuant to the act. That the property of the said ships and lighters so intended to be transferred was then in the testator, and that the certificates of registry of the same were not recited in the said indenture, as required by the statute ; wherefore, the said indenture was utterly null and void to all intents and purposes. To this there was a general demurrer and joinder.

Manley in support of the demurrer.

Wood, *contra*.

Lord Ellenborough, C.J. The case of Mouys *v.* Leake is founded on admirable good sense and sound law. This is an attempt to put a harsher construction on these acts than has ever yet been done, and cases sufficiently hard have already occurred, though altogether the acts are very beneficial to the public. This was an assignment, by way of mortgage, of certain ships, which by the direction of the acts must have certificates of registry ; and in order to make the assignment effectual as sales of these ships, it is necessary that it should contain recitals of the certificates, according to the direction of § 17 of the 26 Geo. 3, ch. 60, which says, "that when the property in any ship belonging to any of His Majesty's subjects shall be transferred to any other subject in whole or in part, the certificate, etc., shall be truly recited, etc., in the bill or other instrument of sale ;" and this must be done on pain of vacating the security. But what security does it vacate ? The bill of sale ; the clause goes on, "otherwise such bill of sale shall be utterly null and void to all intents and purposes. It does not vacate the whole instrument which may happen also to contain any other independent contract between the parties ; but that part of it only which operates as a bill of sale. Nor was it necessary to do more, and therefore the words of the stat. 34 Geo. 3, ch. 60, § 14 are that no transfer, contract, or agreement for transfer of property in any ship shall be valid, unless it be in

writing, containing the recital prescribed by the former act. And thus far it was necessary to go to give effect to the acts. But to go farther, and vacate the covenant for payment of the money lent, would be going beyond the reason and object of the legislature in order to work injustice. If we wanted any case to warrant this construction, it is supplied by that which has been cited, where the question arising upon the stat. 13 Eliz., ch. 20 containing words of avoidance equally strong with the registry act; the Court held that it did not affect the personal covenant to pay the rent-charge, but only defeated the security of such rent-charge upon the living.

LAWRENCE, J.[1] The object of the act will be very sufficiently answered if we hold it to make void so much only of the instrument as is meant to convey the property in the ships. The object of the legislature was that it should be made appear who were the real owners of British ships, in order to prevent any transfer of them to foreigners, who might navigate them under the privileges of the British flag. That will effectually be done by saying that the transfer shall be void if the requisites be not complied with, without avoiding a collateral covenant for the payment of money contained in the same deed by which the ships were intended to be mortgaged. And this construction is according to the rule of the common law, as laid down by Hutton, J., in Ley's Rep. 79, that when a good thing and a void thing are put together in the same grant, the common law makes such a construction that the grant shall be good for that which is good, and void for that which is void. There is indeed a distinction taken in Hob. Rep. 14 between an avoidance of an instrument by the common, or by the statute law; that if it be void in part by the statute law, it is void for the whole, but that the common law only avoids so much of it as is bad, leaving the rest which is good, which distinction was alluded to by Lord Wilmot, C.J., in Collins *v.* Blantern.[2] But these cases, when examined, are easily reconcilable, as in the case of sheriffs' bonds, which are only authorized to be taken with a certain condition; and therefore if they be taken with any other condition, they are void in toto, and cannot stand good in part only, but that does not apply to different and independent covenants in the same instrument, which may be good in part and bad in part. The case, therefore, of Mouys *v.* Leake agrees with all the authorities, and governs the present case.

LE BLANC, J. Our opinion on the construction of the registry act is fully supported by the case cited, but even without that I should have had no doubt upon the subject. For the

[1] Grose, J., was absent from indisposition.

[2] 2 Wils. 351.

object of the act, which was to enforce a mere political regulation, is effectually attained by avoiding the transfer of the ships, for want of the requisites in the bill of sale, and there being nothing immoral in the transaction itself, there is no necessity for carrying the construction further. When, therefore, the act says that for want of certain requisites such "bill of sale" shall be void, it means only that such transfer of the property shall be void.

Judgment for the plaintiff.

GASKELL *v.* KING.

IN THE KING'S BENCH, MAY 5, 1809.

[*Reported in* 11 *East* 165.]

THE plaintiff declared in covenant upon an indenture of March 2d, 1807, whereby he demised to the defendant a messuage for twelve years, at a certain rent, payable quarterly, clear of all and all manner of parliamentary, parochial, and other taxes, rates, assessments, and deductions whatsoever. And the defendant covenanted to pay to the plaintiff the said rent in manner the same as is thereinbefore made payable. The plaintiff then alleged a breach of the covenant by the non-payment of £26 5*s.* for a quarter's rent, due on December 25th, 1808. The defendant craved oyer of the indenture, in which the covenants were stated in the manner and order before mentioned; and then followed immediately after the words, in manner the same as is hereinbefore made payable, these words: "And also shall well and truly pay the land-tax, property-tax, and all and all manner of other taxes, etc., whatsoever, parliamentary, parochial, or otherwise, however, which now are, or which shall at any time during the continuance of the said term hereby demised be rated, taxed, assessed, or imposed on the said demised premises or any part thereof, or on the said plaintiff, his executors, etc., on account thereof, and save harmless and indemnified the plaintiff therefrom, and from all costs and charges which may happen on account thereof." And then it set out a covenant by the defendant to keep the premises in repair, and other covenants, among others, a covenant for reentry of the plaintiff in case of the breach of any of the covenants by the defendant, including the non-payment by the de-

fendant of the property-tax and other taxes covenanted to be paid by him, concluding with a covenant by the plaintiff, that the defendant, paying the said yearly rent thereby reserved in manner aforesaid, and performing his covenants aforesaid, shall quietly enjoy the premises during the term. And then the defendant demurred generally. And the question was whether the covenant for payment by the lessee of the property-tax rendered the whole lease void by the act of the 46 Geo. 3, ch. 65, §§ 115, 195, which avoids such a covenant.[1]

Lawes for the defendant.

Lord Ellenborough, C.J. The covenant by the lessee for payment of the property-tax and for indemnifying the landlord from it is void by the statute, but that will not avoid other independent covenants in the lease which are good, such as that for payment of rent. The covenants are entirely distinct.

Le Blanc, J. If the subsequent covenant for payment of the property-tax had not been inserted in the lease, it could not have been pretended that the lease would be void because it reserved the rent clear of all parliamentary taxes, for that must be understood of taxes which the tenant might lawfully covenant to pay in exoneration of his landlord.

Bayley, J. In the construction of the general words stipulating for the payment by the tenant of all parliamentary taxes, the law would imply an exception of such taxes as could not legally be defrayed by him, and the subsequent illegal covenant by the tenant for indemnifying his landlord from the payment of the property-tax will not avoid the former general and good covenant for the payment of rent clear of all parliamentary

[1] 46 Geo. 3, ch. 65. By § 115. If any person shall refuse to allow any deduction authorized to be made by this act out of any rent or other annual payment mentioned in the 9th and 10th rules of No. 4, Schedule A, or out of any annuity or annual payment mentioned in Schedule C or E, or in the next preceding clause, save such annual interest as aforesaid, every such person shall forfeit the sum of £50; and all contracts, covenants, and agreements, made or entered into, or to be made or entered into for payment of any interest, rent, or other annual payment aforesaid, in full, without allowing such deduction as aforesaid, shall be utterly void.

Sec. 195. Provided that no contract, covenant, or agreement between landlord and tenant, or any other persons, touching the payment of taxes or assessments to be charged on their respective premises, shall be deemed or construed to extend to the duties charged thereon as aforesaid, nor to be binding contrary to the intent and meaning of this act; but that all such duties shall be charged upon and paid by the respective occupiers, subject to such deductions and repayments as are by this act authorized and allowed; and all such deductions and repayments shall be made and allowed accordingly, notwithstanding such contracts, covenants, or agreements.

taxes, etc.; and if the tenant had paid the property-tax for his landlord, he might, notwithstanding such covenants, have produced the collector's receipt to the landlord in discharge of so much of the rent.[1]

Per CURIAM. Judgment for the plaintiff.

NEWMAN, EXECUTRIX OF H. NEWMAN, *v.* NEWMAN.

IN THE KING'S BENCH, APRIL 25, 1815.

[*Reported in* 4 *Maule & Selwyn* 66.]

IN debt on bond, dated May 13th, 1780, for £14,000, made by the defendant, son of H. Newman, the testator, to the said H. Newman, the condition recited that by the will of one Newman, deceased, the said H. Newman (the testator) had an estate for life expectant upon the death of F. Newman, his brother, without issue male, in certain manors, lands, etc., in North and South Cadbury and Sparkford in the county of Somerset, and that the defendant, who had married the daughter of F. Newman, was remainder-man in tail, and that it had been agreed between the said F. Newman, who had no issue male, H. Newman, and the defendant, that a common recovery should be suffered in order to bar all estates tail, and that the defendant and H. Newman had agreed that by the deed to lead the uses, the estate of H. Newman should be vested in the defendant and his heirs, etc., and that the defendant should pay on or before December 13th next to H. Newman £1000 and £7500 within six months after the death of F. Newman, and that in case the benefices or livings of the parish churches of South Cadbury and Sparkford, or either of them, should at any time thereafter become vacant during the joint lives of the defendant and Edwin Newman, his brother, then a minor, and if at the time of such vacancy the defendant should be entitled to the right of presentation, and the said Edwin should then be qualified to be presented and admitted, he (the defendant) would present the said Edwin to supply such vacancy, and to be the rector of the said benefice; or if at the time of such vacancy the said Edwin by reason of nonage should not be qualified to be presented, and should not be qualified within six calendar months next after such vacancy, so that it would be necessary for the defendant to present some other person to prevent a lapse, then

[1] See Art. 9, of No. 4, Schedule A, § 74 of the Property act.

the defendant would upon the request of the said Edwin, or upon notice in writing given to the defendant by the said Edwin, at any time after he should be qualified to be presented and admitted, procure the then incumbent to resign the said rectory into the hands of the ordinary, so that the same might again become vacant, and thereupon the defendant should present the said Edwin to be rector, and the condition was for the performance of these several things agreed to be done by the defendant. And all this appearing upon oyer of the bond and condition, the defendant pleaded that before and at the time of making the said writing obligatory F. Newman was seized of the said manors, etc., to which the advowsons of the churches of South Cadbury and Sparkford respectively belonged, etc. (as in the condition of the bond), and that the agreement in respect of the several things agreed to be done by the defendant was simoniacal, whereby the said writing obligatory is wholly void. Demurrer. Joinder.

Gaselee in support of the demurrer.

Marryat, *contra*.

LORD ELLENBOROUGH, C.J. What the effect of a bond of resignation in favor of a son might be, was not, I believe, touched upon in The Bishop of London *v.* Ffytche, though perhaps it might be argued that there is no reason for any distinction, because a parent would be more open to prejudice and improper bias in favor of a son than of any other person. But admitting the condition of this bond to be ill as to one part of it, it seems that it may be well as to the other parts, for you may separate at the common law the bad from the good.[1] Supposing therefore we held it to be simoniacal so far as it regards the presentation of the son of the obligee, yet for the payment

[1] That bonds and other deeds may, in many cases, be good in part, and void for the residue, where the residue is founded in illegality, but not *malum in se*, is a doctrine well founded in the common law, and has been recognized from a very early period. Thus, in Pigot's Case, 11 Co. Lit. 27*b*, it was said that it was unanimously agreed in 14 Hen. 8, 25, 26, that if some of the covenants of an indenture, or of the conditions endorsed upon a bond are against law, and some are good and lawful, that in this case the covenants or conditions which are against law are void *ab initio*; and the others stand good. And notwithstanding the decision in Lee *v.* Coleshill, Cro. Eliz. 529—which, however, is distinguishable, being founded on a statute—the doctrine has been maintained, and is settled law at the present day in all cases where the different covenants or conditions are severable, and independent of each other, and do not import *malum in se*, as will abundantly appear from the case of Newman *v.* Newman, 4 M. & Selw. 66, and the other cases hereafter stated, and many more might be added. — Story, J., United States *v.* Bradley, 10 Peters, 343, 360–361. — ED.

of the two sums of £1000 and £7500 it is exempt from all vice. Therefore that objection would not be a bar to this action.

LE BLANC, J. The reason for making an exception in favor of a condition for presenting a son, might be, because it was not for a money consideration.

DAMPIER, J. If a bond to resign in favor of a particular person were necessarily void, the objection would have been good in Johns *v.* Lawrence. But a stipulation to resign in favor of a specified person does not seem to be open to the same objection as if it were to resign generally, because the latter makes the incumbent but a mere tenant at will to the patron. I know that since the case of The Bishop of London *v.* Ffytche it has been considered that bonds of resignation in favor of specified persons are not illegal.

Per CURIAM. Judgment for the plaintiff.

THE ERIE RAILWAY COMPANY *v.* THE UNION LOCOMOTIVE AND EXPRESS COMPANY.

IN THE SUPREME COURT OF NEW JERSEY, NOVEMBER TERM, 1871.

[*Reported in* 35 *New Jersey Law Reports* 240.]

THIS suit was in case on promises. The articles of agreement on which the action was founded was between the Erie Railway Company, of the first part, and Kasson & Company and their assigns, of the second part.

The following are the articles :

SCHEDULE.

This agreement, made this 18th day of May, 1869, between the Erie Railway Company, a body corporate of the State of New York, and recognized by the laws of the State of New Jersey and the State of Pennsylvania, party of the first part, and Kasson & Company and their assigns, of New York City, party of the second part—

Witnesseth : Whereas the party of the second part own and are desirous, on their account, to construct certain cars of an unusual size and of great strength, weight, and capacity, whereon locomotive engines and tenders can be conveyed over the railway of the party of the first part, in the States of New Jersey, New York, and Pennsylvania ; and whereas such cars,

with the locomotive engines thereon, when drawn over the railway of the party of the first part, will subject the same to greater wear and strain than that produced by the ordinary cars constructed and used on said railway for the transportation of freight and passengers—

Now, therefore, in consideration of the premises, and the sum of $1, paid by the party of the second part to the party of the first part, it is agreed between them as follows :

First. That the party of the second part will provide cars and trucks sufficient in size, strength, and weight, and capacity, whereon to carry all locomotive engines and tenders over the road of the party of the first part, and place the said cars and trucks on the road of the party of the first part.

Second. Such trucks and cars, and the locomotive engines and tenders thereon, shall be hauled and moved by motive power, to be supplied by the party of the first part, at such times and in such manner as not to interfere with the traffic and business of the party of the first part on their said road, and to such points on the said road as shall be required by the party of the second part.

Third. The party of the second part shall not only furnish such trucks and cars, but shall also be at the expense of loading and unloading the same, and shall furnish the necessary hands and means for guarding, managing, and taking charge of all such cars and trucks, and the locomotive engines and tenders to be conveyed thereon, and only the motive power, with the engineer, fireman, and ordinary attendants of freight trains, shall be furnished and supplied by the party of the first part.

Fourth. In consideration of the risk and danger incident to the transportation of trucks and cars of unusual size and weight, with the locomotive engines to be carried and conveyed thereon, the party of the second part do agree with the party of the first part, not to hold the party of the first part liable as common carriers, under the laws of the land as relating to common carriers, for any injury that may arise to said trucks and cars, or to the locomotive engines thereon to be transported, arising from any defect or want of capacity in said cars and trucks, or from any neglect or want of care on the part of the party of the second part, or their employés or servants.

Fifth. For the motive power to be supplied by the party of the first part, and for the unusual wear and strain of their railway, the party of the second part shall pay, as compensation, not less than thirty-five cents per mile for each locomotive engine and tender, nor more than seventy cents per mile for each locomotive engine and tender, or such higher rates of

compensation as shall be mutually agreed upon; but it is agreed that the party of the first part shall have a minimum rate for any short distance of not less than $25.

Sixth. The party of the second part shall take and receive all locomotive engines and tenders to be transported on trucks and cars over said railways, and shall receive all freights and compensations for such transportation, and the party of the second part can agree for such rates of compensation, for such transportation of locomotive engines and tenders on such cars and trucks, as they may be able to make with the person or persons, party or parties, with whom they may be able to contract, as aforesaid.

Seventh. In consideration of the large expense incurred and to be incurred by the said party of the second part under this contract, it is agreed by the Erie Railway Company, that the cars of the said party of the second part shall be the only cars employed in the conveying of locomotive engines and tenders as aforesaid; and it is agreed further, that the party of the first part shall have the right to load the returning cars or trucks, which would otherwise be returned empty, with such freight as they may deem proper, without payment to the party of the second part for use of said returning cars, provided said cars are not damaged or unnecessarily held or detained by such loads; and provided also, that such freights shall not consist of locomotive engines and tenders.

Eighth. This contract to be and continue in force for five years.

(Signed) Erie Railway Company,
Jay Gould, *President.*

(Signed) Kasson & Co.

[Five cent stamp, cancelled, on original.]

For value received, we hereby sell, assign, transfer, and set over the within contract, made the 18th day of May, 1869, between the Erie Railway Company and ourselves, to the Union Locomotive and Express Company, a body corporate of the State of New Jersey, they agreeing to keep and perform all the stipulations and agreements on the part of Kasson & Company in said contract.

Kasson & Co.

New York, June 12th, 1869.

The plaintiffs, in their declaration, after setting forth in substance the said agreement and assignment, aver that, relying upon the good faith of the defendants, and that they would, in all things, comply with their agreement, they expended large sums of money—viz., $100,000—in the purchase of cars, trucks,

and other materials, for transporting said locomotives and tenders, and in the employment of laborers and servants to carry out and perform the said agreement. And they further aver, that if defendants had performed the agreement on their part, and had allowed or permitted the plaintiffs to perform the agreement on their part, they, the plaintiffs, would have made, during the time of said contract, a large amount of money, to wit, $100,000, and that the contract was worth to them, at the time of the agreement, that amount. Yet the said defendants, well knowing the same, afterward, to wit, etc., refused to permit, and would not permit or allow the said plaintiffs to transport locomotives on the railway of said defendants, according to said contract, and would not permit or allow said plaintiffs to transport locomotives and tenders upon the said defendants' railway, as was provided for by said contract or agreement, whereby all the said cars, trucks, and other materials purchased as aforesaid by plaintiffs became worthless, and whereby also said plaintiffs were obliged to and did pay out a large amount of money, to wit, $10,000, to laborers whom they had employed, to enable them to perform the transportation of such locomotives and tenders (of which there was a large number at the time of the assignment aforesaid, and hitherto has been, to transport upon the railway of the defendants), and a large sum, to wit, $5000, for rent of offices for carrying on their business, and were put to divers other losses and inconveniences, to wit, at Paterson aforesaid. There was a second count to the declaration, which need not now be referred to.

The defendants demurred generally to the whole declaration, and there was a joinder.

The case was argued at June Term, 1871, before Beasley, C.J., and Dalrimple, Depue, and Van Syckel, JJ.

I. W. Scudder for demurrer.

A. B. Woodruff, contra.

The opinion of the Court was delivered by

Beasley, C.J. Upon the argument before this Court, the counsel for the defendants relied chiefly, in support of the demurrer, upon the proposition that the stipulation contained in the article of agreement, which gave to the plaintiffs the exclusive right to carry locomotives and tenders on trucks over the Erie road, was illegal. The principle that, as common carriers, the defendants were bound to exercise their office with perfect impartiality, in behalf of all persons who apply to them, and that, practising this public employment, they cannot discharge themselves, by contract, from the obligation, was appealed to in support of this position.

The agreement between these parties was, in short, this: The firm of Kasson & Company, who were the assignors of the plaintiffs, the Union Locomotive and Express Company, agreed to provide "cars and trucks sufficient in size, strength, weight, and capacity, whereon to carry all locomotive engines and tenders," and that they would be at the expense of loading and unloading the same; and for the motive power, which was to be supplied by the Erie Railway Company, the defendants, and for the unusual wear and strain of their railway, a certain compensation, which was stated in said articles of agreement, was promised to be paid. On their side, the Erie Railway Company agreed, in addition to the stipulations for providing motive power and giving the use of the road, that the cars of the assignors of plaintiffs should be the only cars employed in the transportation of locomotive engines and tenders. It is this last provision which gives rise to the objection already stated. It is insisted this stipulation gives the plaintiffs the exclusive control, on their own terms, of this branch of business; that it precludes all competition, and being the grant of a monopoly, is inconsistent with the purpose and objects of the charter of the defendants, and with their character as common carriers. The question thus presented is one of much importance, and it should not, consequently, be decided except when it shall be an element essential to the judgment of the Court in the particular case. That it is not such an element, on the present occasion, is obvious, for, let it be granted that the provision in question is illegal, and therefore void, still such concession cannot, in the least degree, impair the plaintiffs' right of action. The suit is not for a breach of this promise of the defendants, that no other cars but those of the plaintiffs shall be employed in this branch of the carrying business, but it is for the refusal of the defendants to permit the plaintiffs to transport locomotives and tenders, according to their contract, over the railway of the Erie Company. This latter stipulation, the violation of which forms the ground of action, is distinct and entirely separable from the former one, in which it is alleged the illegality before mentioned exists. Admitting, then, for the purpose of the argument, the illegality insisted on, the legal problem plainly is this, whether, when a defendant has agreed to do two things, which are entirely distinct, and one of them is prohibited by law, and the other is legal and unobjectionable, such illegality of the one stipulation can be set up as a bar to a suit for a breach of the latter and valid one. This point was but slightly noticed on the argument; nevertheless, an examination of the authorities will show that the rule of law upon the sub-

ject has, from the earliest times, been at rest. It was unanimously agreed, in a case reported in the Year Books, 14 Henry VIII., 25, 26, that if some of the covenants of an indenture, or of the conditions endorsed upon a bond, are against law, and some good and lawful, that in such case, the covenants or conditions which are against law are void *ab initio*, and the others stand good. And from that day to this I do not know that this doctrine, to the extent of its applicability to this case, has anywhere been disallowed. It was the ground of the judgment in Chesman *v.* Nainby, 2 Lord Raymond, 1456, that being a suit on an apprentice's bond. The stipulation alleged to have been broken was, that the apprentice would not carry on the business in which she was to be instructed, within "the space of half a mile" of the then dwelling-house of the plaintiff. There was also a further stipulation that she should not carry on this business within half a mile of any house into which the plaintiff might remove. The suit was for a breach of the former stipulation, and it was admitted that the latter one was void, as imposing an unreasonable restraint on trade, and it was urged that, by force of this illegal feature, the whole contract was void. But the Court were unanimously of opinion that as the breach was assigned upon that part of the condition which was good in law, therefore if the other part, to which exception was taken, was against law, yet that would not hinder the recovery upon part of the condition which was legal. This judgment was afterward affirmed by the twelve judges, on an appeal to Parliament. 3 Bro. Parl. C. 349.

This rule of law was treated as settled, and was similarly applied in the modern cases of Mallan *v.* May, 11 M. & W. 653, and Price *v.* Green, 16 M. & W. 346. This same legal principle will be found to be discussed and illustrated by different applications in the following decisions: Gaskell *v.* King, 11 East, 165; 15 East, 440; Nichols *v.* Stretton, 10 Adol. & El., N. S. 346; Chester *v.* Freeland, Ley R. 79; Sheerman *v.* Thompson, 14 Adol. & El. 1027.

These and other authorities which might be referred to settle the rule, that the fact that one promise is illegal will not render another disconnected promise void. The doctrine will not embrace cases where the objectionable stipulation is for the performance of an immoral or criminal act, for such an ingredient will taint the entire contract, and render it unenforceable in all its parts, by reason of the maxim *ex turpi causa non oritur actio*. Nor will it, in general, apply where any part of the consideration is illegal, so that in the present case, if, upon the trial, it should appear that the plaintiffs have agreed to pay to the de-

fendants more than the charter of the latter allows, it may become a question whether this suit will lie. There are many decisions to the effect that where there are a number of considerations, and any one of them is illegal, the whole agreement is avoided, this doctrine being put upon the ground of the impossibility of saying how much or how little weight the void portion may have had as an inducement to the contract. But, at the present stage of the cause, the entire consideration of the promise sued on must be regarded by the Court as unobjectionable, as there is nothing on the record to show any overcharge.

On the ground, then, that both the consideration and the promise, which is the foundation of the action, appear to be valid, the plaintiffs must have judgment on this demurrer.

It is proper to remark that as the demurrer is a general one to the whole declaration, I have considered only the cause of action set out in the first count.

Judgment for plaintiffs.

ALEXANDER H. LINDSAY *v.* GEORGE J. SMITH AND JOSEPH HOSKINS.

IN THE SUPREME COURT OF NORTH CAROLINA, JANUARY TERM, 1878.

[*Reported in* 78 *North Carolina* 328.]

CIVIL action for breach of covenant, tried at Fall Term, 1877, of Guilford Superior Court, before Buxton, J.

The case is sufficiently stated by Bynum, J., in delivering the opinion of this Court. Upon the hearing in the Court below, His Honor sustained the demurrer of defendants and dismissed the action. Judgment for costs. Appeal by plaintiff.

J. N. Staples and *Merrimon, Fuller & Ashe* for plaintiff.

J. A. Gilmer for defendants.

BYNUM, J. This is an action for a breach of covenant. The defendants demur to the complaint, and the facts are these: On February 17th, 1874, an indictment was pending in the Superior Court of Guilford County, against the plaintiff, Lindsay, for erecting and maintaining a public nuisance, by constructing a dam across a certain creek, and ponding back the water thereof, which thereby became stagnant, fœtid, and unwholesome, to the common nuisance of the citizens. That on

said February 17th the covenant sued on was entered into, whereby the defendants covenanted under the penalty sued for, to cut, maintain and keep in repair a certain ditch through the lands of the plaintiff; and that the plaintiff covenanted that when the work was done he would pay the defendants $50; and it was further covenanted as follows: "And it is further agreed by all the parties hereto, in consideration of the premises, that the indictment now pending in the Superior Court of Guilford County, against the said Alexander H. Lindsay, found at February Term, 1873, shall be discontinued and not proceed, and the prosecution thereof stopped without cost to the said Lindsay." . . . "And it is further agreed and understood by all the parties hereto, that this agreement is to be of no binding force on any of said parties whose names are signed hereto, until and unless the indictment hereinbefore spoken of shall be discontinued without cost to the said Lindsay." And this covenant is signed by the plaintiff and defendants.

Assuming this covenant to have been broken by the defendants, do these facts constitute a cause of action?

But the defendants' counsel contends with great ingenuity that there are two covenants in this sealed instrument, and that they are divisible, part being good, and part bad; that the contract of the defendants is to do two things: first, to dismiss the indictment, which is illegal and void, but second, to cut and keep up the ditch, which is legal and valid, and is the contract for the breach of which the action is brought.[1] In regard to this proposition the general rule is that if there are several considerations for separate and distinct contracts, and one is good and the other bad, the one may stand and be enforced, although the other fails, under the maxim "*utile per inutile non vitiatur*." But where there is but one entire consideration for two several contracts, and one of these contracts is for the performance of an illegal act, the whole is void, as where one sum is to be paid for the doing of a legal and illegal act. Thus, where upon a contract for the hiring and service of a housekeeper at certain agreed wages it appears to have been a part of the contract that the housekeeper should cohabit with her master, the whole will be void and the wages irrecoverable by her. Rex *v.* Northingfield, 1 B. & Ad. 912; Willyams *v.* Bullmore, 32 Beav. 574; 1 Addison on Contracts, § 300. In Alexander *v.* Owen, 1 T. R. 227, the case was this: Upon a contract of sale of tobacco, it was agreed that counterfeit money should be taken in payment, and the tobacco having been delivered and the counterfeit money sent, the vendor refused to receive it and

[1] Only so much of the opinion is given as relates to this question.—ED.

brought an action to recover the price of the tobacco, but the Court said that the sale could not be held to be good and the payment bad ; if it was an illegal contract, it was equally bad for the whole, and the parties being *in pari delicto, melior est conditio defendentis*. Apply these principles to our case. There was but one indivisible consideration moving from the plaintiff, to wit, the sum of $50, and for that consideration, the defendants covenant to do two things—the one legal and the other illegal. The consideration cannot be divided and enough of it assigned to support the contract to cut and maintain the ditch, but it, as it were, *per my et per tout*, enters into and supports both promises.

But there is another view equally fatal to this action. A part of the covenant is in these words : "And it is further agreed and understood by all the parties hereto, that this agreement is to be of no binding force on any of said parties whose names are signed hereto, until and unless the indictment hereinbefore spoken of shall be discontinued without cost to the said Lindsay." So the validity of the contract is expressly made to depend upon the performance of the very act which makes it invalid, to wit, the dismissal of the indictment. The covenants were not to be binding until the prosecution had been discontinued, and the contract to dismiss it was immoral and void. In such cases the law will leave the parties where it finds them. Kimbrough *v.* Lane, 11 Bush. 556 ; Setter *v.* Alvey, 15 Kan. 157 ; 1 Smith Lead. Cases, Marg. pp. 153–165 and notes ; King *v.* Winants, 71 N. C. 469, and 73 N. C. 563.

No error.

Per CURIAM. Judgment affirmed.

OHIO EX REL. LASKEY ET AL. *v.* BOARD OF EDUCATION OF PERRYSBURG.

IN THE SUPREME COURT OF OHIO, JANUARY TERM, 1880.

[*Reported in* 35 *Ohio State Reports* 519.]

APPLICATION for a peremptory writ of mandamus.

November 7th, 1868, the Board of Education of School District No. 1, Perrysburg Township, Wood County, being then engaged in the erection of a public-school building, and having incurred obligations therefor, resolved to issue and sell bonds to aid in paying the same, under the act of May 13th, 1868. (S. & S. 710, 711.)

The resolution is as follows :

" *Resolved*, That this board borrow of George Laskey [one of the relators herein, and who, in this transaction, acted for his brother and himself] six thousand dollars, at the rate of fifteen per cent per annum, to pay indebtedness, and that we issue bonds for said money as follows : $2000, two and a half years ; $2000, three years ; $2000, three and a half years ; said bonds to bear eight per cent interest per annum ; and that to make up the deficit of interest we issue orders on the treasury, payable at the same date of bonds, said orders not to bear interest, and to pay said bonds and orders over to said George Laskey for and on account of money so borrowed."

This was passed pursuant to an understanding with one of relators, that the money could be had on those terms. Accordingly three bonds of $2000 each, bearing interest at eight per cent per annum, payable semi-annually, due at the times stated, were issued and sold to relators, at par in cash, which was paid into the treasury and used for the purposes intended. At the same time, in order to make up the difference of interest of 7 per cent, orders on the treasury were issued, falling due at the semi-annual payments of interest, and were delivered to relators with the bonds, and as part of the same transaction.

In January, 1869, the further sum of $1200 was borrowed under a like resolution, on a bond of that amount, and like tenor, and the difference in interest was provided for by similar orders.

Thus, for the sum of $7200 in cash, relators received the bonds of the school district, regular on their face, and negotiable in form, for an equal amount, with interest payable semi-annually at 8 per cent ; and also a series of orders of even date, due at the respective times for payment of the 8 per cent, for the extra 7 per cent, amounting in the aggregate to $1596.

These orders remain unpaid—in fact, were never presented for payment, and the relators have offered to return them, and are now willing to surrender them for cancellation.

There is a large amount of evidence found in the record strongly tending to show that in the letting of the contracts for the erection of the building, and in the prosecution of the work, there was fraud and malfeasance by some, at least, of the members of the board, by which the debt was incurred, for the payment of which these bonds were issued ; but as it does not appear that relators were parties therein, or had notice thereof, and as those parties have no connection with the sale of the bonds, it is not necessary to abstract this evidence.

Swan & Moore for plaintiffs.

Scribner, Hurd & Scribner for defendants.

JOHNSON, J. The first section of the act of March 13th, 1868 (S. & S. 710, 711), under which the bonds in controversy in this case were issued and sold, authorizes the issue of bonds "bearing interest payable semi-annually, at a rate not exceeding 8 per centum per annum." The third section provides, that "the bonds so issued shall, in no case, be sold for a less sum than their par value;" and, also, that the bonds shall bear date the day of the sale, and provides for a complete record of the transaction.

That the parties intended to evade that provision of the statute against a rate of interest exceeding 8 per cent per annum, payable semi-annually, is clear.

That the form which they gave to it is not conclusive of its real character, as between these parties, is equally clear. These relators dealt directly with the Board of Education, and were parties to this attempted evasion of the statute. If that attempt avoids the bonds, they must suffer the consequences.

As a general principle, the agents or officers of a corporation like this cannot bind the public beyond the scope of its powers.

Where the duties and powers of these agents or officers are prescribed by statute or charter, all who deal with them are bound to know the extent of these powers.

It results from this doctrine that contracts made that are unauthorized by the statute or charter are void, and that the corporation may protect itself by the plea of *ultra vires*. The exception to this rule, in favor of *bonâ fide* holders of negotiable securities, need not be here noticed. There is, however, another class of exceptions, whose limits are not, as yet, very clearly defined, arising out of equitable considerations, that we may have occasion to notice further along.

This statute imposes two limitations on the power of the board in the issue and sale of bonds; they shall not bear a rate of interest exceeding 8 per cent, and shall not be sold at less than their par value.

If either inhibition were omitted, the other could be readily evaded.

By the sale of bonds, at a discount, the semi-annual interest agreed to be paid would be increased beyond 8 per cent, and thus that clause of the statute would be evaded.

These two provisions, taken together, limit the powers of a board of education, so that it can neither directly nor indirectly pay interest at a higher rate than the statute prescribes.

No claim is, or can be, made that the bonds were, in fact,

sold for less than their par value, as an equal amount of cash was paid and received therefor, and the money was expended as public funds, for the purposes for which it was borrowed.

The resolution of the board fully explains the real transaction, and conclusively shows that the intention was to pay an excessive rate of interest, and that it was not the intention of either party to sell the bonds at less than their face value.

So far, then, as this intention of parties gives character to and affects the transaction, it must be regarded as an attempt to evade the interest clause of this statute, and not to sell the bonds at less than par.

Conceding that the Court will, as between the parties, go behind the face of the bonds, and ascertain the real nature of the transaction, we are left to determine whether an agreement to pay illegal interest, and the giving of these orders therefor, which have never been paid, and which are themselves void, entitles the corporation to plead *ultra vires*, and so avoid payment of the bonds. It was the object of this statute to protect the public. No obligation should be sold at less than par, and no contract to pay a higher rate of interest than that named could be made.

By complying with this statute the public would receive full value for the bonds, and be under no obligation to pay usurious interest.

By non-compliance, the public would be injured to the amount of the discount, or of the excess of interest paid.

If the relief now sought be granted, it cannot be claimed that any loss or injury results to the school district. It is the case of an intended violation of the statute, never consummated.

The iniquity is in thought, not in deed. It is said, however, that, taking the transaction as a whole, it is tainted with fraud and therefore void, and this view is sought to be supported by the analogies of usury laws.

In Ohio, an usurious contract does not carry with it that deep moral stain that attached under the usury laws of England and some of the States. Here, such a contract is not void, and a recovery thereon, to the extent of the loan and legal interest, can be had. The theory on which this principle is founded, is that, to the extent of the usurious interest, there is a failure of consideration, and, therefore, as to the usury the contract is voidable only. Selser *v.* Brock, 3 Ohio St. 302.

These bonds, if void at all, are so, not on the ground of any deep moral stain, arising from the contract for usury, but from a want of capacity in the board to make such a contract. They

are illegal, if at all, because unauthorized by statute—that is, because the board had no power to make such a contract.

As was said in Bank of Chillicothe *v.* Swayne *et al.*, 8 Ohio, 289: "The contract is void, not because the rate of interest is greater than the rate allowed by the general law of the land, but because it is such a contract as the plaintiffs had no capacity or power to make."

These bonds are such as the board had capacity to issue. Upon their face they are in strict conformity to the statute. They were, in fact, sold at par, and the money has been received into the treasury and used for the purpose intended by the statute. The public has had the full benefit of the loan, and has not sustained, nor is it liable to sustain, any loss or injury by reason of this outside agreement to pay excessive interest. If this was an action on the bonds, unaffected by this statute, there could be no doubt of a recovery for the full amount loaned, with the legal rate of interest then in force according to the construction placed upon our interest laws. Neither can there be any doubt that the contract to pay usury, evidenced by the orders, would be void for want of consideration to support it.

As has been already said, if this excess of interest had been paid the statute would have been violated, but as the promise to pay excessive interest was purely executory, and the orders evidencing this promise are void, and are offered for cancellation, and no injury has happened or can happen to the public, no sound reason can be given why the corporation should not pay its just debt.

The negotiations for the loan, though in their inception an entirety, for the loan of a sum of money at 15 per cent, yet, as consummated by the contract actually made, consisted of two distinct promises by the board, based upon a single consideration. The one, evidenced by the bonds in strict conformity with the statute; the other, evidenced by the orders covering the excess of interest. The board did not intend to make one contract, nor did it. In its attempt to exercise the powers conferred, the two agreements were made, both regular and valid on their face, but one clearly in excess of the powers granted.

This brings the case clearly within the rule: "That when a power, created by statute, has been fully executed, and something not authorized by the statute has been added, but which is clearly distinguishable from the rightful execution, the execution of the power is good, so far as authorized by the statute, and void only as to the excess"—that is, at law. Comm'rs of Knox Co. *v.* Nichols, 14 Ohio St. 260.

In such cases the general rule is that "where there is a complete execution of the authority, and something *ex abundanti* is added which is improper, then the execution is good and the excess only is void, but where there is not a complete execution of the power, or where the boundaries between the excess and the rightful execution are not distinguishable, then the whole is void." Story on Agency, 166; Doty *v.* Knox County Bank, 16 Ohio St. 133; 2 Kent's Com. 467.

In Widoe *v.* Webb. 20 Ohio St. 435, it is said, that "where for a legal consideration a party undertakes to do one or more acts, and some of them are unlawful, the contract is good for so much as is lawful and void for the residue. Whenever the unlawful part of the contract can be separated from the rest, it will be rejected and the remainder established." Care must be taken not to confound this rule with another equally well settled, that where one of two considerations is illegal, and the other legal, the illegality of the one avoids the promise founded on both.

In the former case there is one lawful and valuable consideration to support two promises, one legal, the other illegal, that are separable. In the latter case there are two considerations, one legal, the other illegal, to support one promise. The reason for this well-marked distinction is, that in the latter case, the promise being supported by two considerations, one lawful, the other unlawful, is an entirety based upon both, and cannot be apportioned, and it is against public policy to enforce a promise so supported. In such a case both considerations, as a whole, are the basis of the entire promise. Where, however, the whole consideration is lawful, and the promisor undertakes to do two things, one that is lawful, and the others unlawful, and they are clearly distinguishable, the good consideration will support the lawful promise.

The case at bar is one of two promises, one lawful, the other unlawful, founded on one lawful consideration. The unlawful promise evidenced by these orders is separate and distinct from the lawful. The former is void because prohibited by statute, while the latter is expressly authorized, and is supported by a valid consideration, to wit, the money loaned. It may be said that these rules do not apply to corporations, but we are unable to discover any reason why they should be exempt of such wholesome principles intended to compel natural persons to pay their just debts.

It is said further that this will open the door to frauds upon the statute and render it nugatory. Under the commercial law bonds like these, regular on their face, are not void, but valid

in the hands of *bonâ fide* holders, however much the statute may have been evaded. Against such holders the statute affords no protection.

As to the party dealing with the board, we all agree, that if he, either directly or indirectly, purchase the bonds at less than par, or receives interest in excess of the lawful rate, he cannot recover because the illegal contract has been in part executed. But where, as in this case, the plaintiff has been guilty of no illegal act, for the statute does not make it an offence to contract for excess of interest, and the public has in no way sustained any loss or injury, a majority of the Court is unable to see the force of the objection. Human tribunals take cognizance of human actions that affect the rights of others. It is beyond their power to deal with intentions not consummated by actions.

That these relators, at one time, intended to take unlawful interest, which intention has been abandoned, furnishes no reason, either in morals or in law, why this school district should not pay its just debts, incurred for a lawful purpose, when it has received the benefit of the money borrowed.

The defendant resists the payment on the further ground, that the facts show that the Board of Education, or at least some of its members, were guilty of fraudulent practices, whereby this debt was incurred, for the payment of which this money was borrowed, and it is sought to charge relators with this, not because they had any knowledge of these practices, but because they bargained for illegal interest, and therefore they are chargeable with the fraudulent acts of the members of the board, of which they were wholly innocent. It was no part of their duty to investigate the circumstances under which that debt was created—to constitute themselves an investigating committee for that purpose. They had the right to assume that the officers of the corporation had performed their lawful duties. Neither were they charged with the duty of seeing that the money was properly expended. The debts had been incurred. This money was borrowed to pay that debt. The conspiracy, if there was one among the members of the board, to unlawfully make money for themselves, was wholly a distinct transaction from that of selling these bonds.

Hence, if it be conceded that they were parties to the attempted fraud on the statute, in the contract for unlawful interest, they did not thereby adopt all prior acts of the Board of Directors in letting contracts and incurring the debts, of which they had no knowledge, and which were entirely inde-

pendent and distinct from the illegal act with which they are charged.

As well might it be said, that where A. joins with B. to commit larceny, he thereby adopts and makes himself a party to a previous act of B. in the commission of homicide. The true application of the rule is, that where two or more form a conspiracy to do an unlawful act, and before it has been committed another joins them in doing the act, it is no defence for him, that the plan was formed before he became a party to the conspiracy.

Peremptory writ awarded.[1]

[1] The dissenting opinion of Okey, J., has been omitted.—ED.

CHAPTER XIII.

IMPOSSIBILITY OF PERFORMANCE.

FULLERTON *v.* AGNEW.

In the King's Bench, Trinity Term, 1702.

[*Reported in* 1 *Salkeld* 172.]

Scire facias against bail reciting a recognizance taken in the time of the late King William III., wherein the condition was, that the defendant should render his body *prisonæ mar. maresch. dominæ reginæ nunc.* It was urged that the condition was impossible, and in consequence the recognizance single. *Et per* Holt, C.J. Where the condition is underwritten or endorsed, there that is only void, and the obligation is single ; but where the condition is part of the lien itself, and incorporated therewith, if the condition be impossible, the obligation is void ; and the Court inclining that it was ill, the plaintiff prayed his writ might be abated for his own expedition.

DUVERGIER *v.* FELLOWS.

In the Common Pleas, Michaelmas Term, 1828.

[*Reported in* 5 *Bingham* 248.]

Debt on the joint and several bond of the defendant, Jean Jacques Saint Mare and others, the condition of which, as set out on oyer, appeared to be as follows : Whereas the said Jean Jacques Saint Mare, some time since, obtained three several letters-patent for the distillation of potatoes ; and whereas the said Jean Jacques Saint Mare, Stamp Brooksbank, and William Dorset Fellows are now engaged in copartnership

together in carrying on a certain distillery to a very large extent at Vauxhall, called the Belmont Distillery, according to the system and method of distilling, for the use and exercise of which the said several letters-patent were granted to the said Jean Jacques Saint Mare, and which said distillery has been erected, set up, and established on certain leasehold premises belonging to them, the said Jean Jacques Saint Mare, Stamp Brooksbank, and William Dorset Fellows; and whereas the said Jean Jacques Saint Mare, Stamp Brooksbank, and William Dorset Fellows have it in contemplation to dispose of their shares and interest of, in, and to the said several patents, and of, in, and to the distillery, premises, plant, and stock in trade in and upon the same, and to part with the same to a company to be formed for that purpose; and whereas the said Jan Jacques Saint Mare, Stamp Brooksbank, and William Dorset Fellows have applied to and requested Aime Duvergier to exert his influence among his numerous connections and friends, so as to form such company, intended to be called "The Patent Distillery Company," who shall appoint directors and trustees for the conduct and management of the said concern, which directors shall issue, under their hands and seals, 10,000 shares of the value of £50 each share; and whereas the said Aime Duvergier, in consequence of his connection with different merchants, brokers, traders, and others in the city of London, hath consented and agreed to form the said company, to be called "The Patent Distillery Company," among his own immediate connections and friends, and to bring such persons together for the purpose of appointing directors and trustees for the government and management of such distillery concern, and to procure purchasers for 9000 shares, of the value of £50 each share; and whereas the said Jean Jacques Saint Mare, Stamp Brooksbank, and William Dorset Fellows, in order to induce the said Aime Duvergier to take the trouble of forming such company, and to use his influence among his connection and friends, and to indemnify him from the charges and expenses that he may be put to in and about the same, have proposed and agreed, as soon as he or his executors or administrators shall have effected such object, and procured purchasers for 9000 of such £50 shares, and obtained for such company the first call upon such shares of £5 each, that they, the said Jean Jacques Saint Mare, Stamp Brooksbank, and William Dorset Fellows, their heirs, executors, or administrators, or some or one of them, shall and will pay to the said Aime Duvergier, his executors, administrators, or assigns, the full sum of £10,000 sterling, by three equal payments or instal-

ments of £3333 6*s.* 8*d.*—viz., the sum of £3333 6*s.* 8*d.* so soon as the first instalment on such 9000 shares shall have been paid, the sum of £3333 6*s.* 8*d.* so soon as the second instalment on the same shares shall have been paid, and the remaining sum of £3333 6*s.* 8*d.* so soon as the third instalment of the same shares shall have been paid ; now, therefore, the condition of the above-written bond or obligation is such, that if the above-bounden Jean Jacques Saint Mare, Stamp Brooksbank, and William Dorset Fellows, their executors or administrators, or any or either of them, do and shall well and truly pay or cause to be paid unto the above-named Aime Duvergier, his executors, administrators, or assigns, the full sum of £10,000 of lawful money of Great Britain, in manner following—that is to say, the sum of £3333 6*s.* 8*d.*, part thereof, on the said Aime Duvergier, his executors or administrators, forming the said before-mentioned company, and procuring purchasers for such 9000 shares, and payment of the first instalment or call thereon ; the further sum of £3333 6*s.* 8*d.* on the second instalment on such shares having been paid ; and the remaining sum of £3333 6*s.* 8*d.* on the third instalment on the same shares having been paid ; then the above-written obligation to be void and of no effect, or else to be and remain in full force and virtue.

The defendant, after sundry pleas, on which issue in fact was taken, pleaded, fifthly, *actio non*, because certain of the said several letters patent in the said condition of the said supposed writing obligatory mentioned, were letters patent of our sovereign lord the king, under the great seal of the United Kingdom of Great Britain and Ireland, bearing date at Westminster on a certain day, to wit, on the twentieth day of March, in the fifth year of the reign of our lord the king, whereby, after reciting, among other things, that the said Jean Jacques Saint Mare had, by his petition, humbly represented unto our said lord the king, that he was in possession of an invention of improvements in the process of an apparatus for distilling, our said lord the king gave and granted unto the said Jean Jacques Saint Mare, his executors, administrators, and assigns, his especial license, full power, sole privilege and authority, that he, the said Jean Jacques Saint Mare, his executors, administrators, and assigns, and every of them, by himself and themselves, or by his and their deputy or deputies, servants or agents, or such others as he, the said Jean Jacques Saint Mare, his executors, administrators, or assigns, should at any time agree with, and no other, from time to time, and at all times thereafter, during the term of years therein expressed, should, and lawfully might, make, use, exercise, and vend the said

invention within that part of the United Kingdom of Great Britain and Ireland called England, our said lord the king's dominion of Wales, and town of Berwick-upon-Tweed, in such manner as to him, the said Jean Jacques Saint Mare, his executors, administrators, and assigns, or any of them, should in his or their discretion seem meet, and that he, the said Jean Jacques Saint Mare, his executors, administrators, and assigns, should, and lawfully might, have and enjoy the whole profit, benefit, commodity, and advantage from time to time coming, growing, accruing, and arising by reason of the said invention, for and during the term of years therein mentioned ; to have, hold, exercise, and enjoy the said license, powers, privileges, and advantages thereinbefore granted or mentioned to be granted unto the said Jean Jacques Saint Mare, for and during and unto the full end and term of fourteen years from the date of the said last-mentioned letters patent next and immediately ensuing, and fully to be complete and ended according to the statute in such case made and provided ; and it was by the said letters patent provided, and the same were declared to be upon the express condition that if the said Jean Jacques Saint Mare, his executors or administrators, or any person or persons who should or might, at any time or times thereafter during the continuance of that grant, have or claim any right, title, or interest in law or equity of, in, or to the power, privilege, and authority of the sole use and benefit of the said invention thereby granted, should make any transfer or assignment, or any pretended transfer or assignment of the said liberty and privilege, or any share or shares of the benefit or profit thereof, or should declare any trust thereof to or for any number of persons exceeding the number of five, or should open, or cause to be opened, any book or books for public subscription to be made by any number of persons exceeding the number of five, in order to the raising any sum or sums of money under pretence of carrying on the said liberty or privilege thereby granted, or should by him or themselves, or his or their agents or servants, receive any sum or sums of money whatsoever, of any number of persons exceeding in the whole the number of five, for such or the like intents and purposes, or should presume to act as a corporate body, or should divide the benefit of the said last-mentioned letters patent or the liberties and privileges thereby granted, unto any number of shares exceeding the number of five, or should commit or do, or procure to be committed or done any act, matter, or thing whatsoever, during such time as such person or persons should have any right or title, either in law or equity, in or to the same premises, which would be con-

trary to the true intent and meaning of a certain act of Parliament made in the sixth year of the reign of the late King George the First, entitled "An act for better securing certain powers and privileges intended to be granted by his Majesty by two charters for assurance of ships and merchandises at sea, and for lending money upon bottomry, and for restraining several extravagant and unwarrantable practices therein, mentioned," or in case the said power, privilege, or authority should at any time thereafter become vested in, or in trust for more than the number of five persons or their representatives at any one time, reckoning executors or administrators as and for the single person whom they represent as to such interest as they were or should be entitled to in right of such their testator or intestate, that then and in any of the said cases those letters patent, and all liberties and advantages whatsoever thereby granted, should utterly cease and become void, anything therein before contained to contrary thereof in any wise notwithstanding; as by the said letters patent, which said letters patent the defendant brought into Court, might more fully appear, and the said defendant further said, that others of the said letters patent, in the said condition of the said writing obligatory mentioned, were and are certain letters patent of our said lord the king, under the seal of our said lord the king appointed by the treaty of union to be used instead of the grand seal of Scotland, bearing date on a certain day, to wit, February 26th, in the fifth year aforesaid; by which last-mentioned letters patent our said lord the king gave and granted to the said Jean Jacques Saint Mare, his executors, administrators, and assigns, by themselves or such other person as he or they might appoint or agree with, and no others, from time to time and at all times thereafter, during the term of years in the said last-mentioned letters patent expressed, that they might lawfully make, use, exercise, and vend an invention therein mentioned, of improvements in the process of, and apparatus for, distilling, within that part of the United Kingdom of Great Britain and Ireland called Scotland, in such manner as to the said Jean Jacques Saint Mare, his executors, administrators, and assigns, or any of them, should in his discretion seem meet:

Then followed the extent and conditions of the Scotch patent, which were the same as in the patent for England.

And the said defendant further said, that the said several terms of fourteen years each in the said letters patent mentioned, at the time of the making of the said supposed writing obligatory, were, and yet are, unexpired, and that the said

company, in the said condition of the said supposed writing obligatory mentioned, was meant and intended by the said Jean Jacques Saint Mare, the said plaintiff, and defendant, at the time of making of the said supposed writing obligatory, to consist of more than five persons, to wit, 10,000 persons, and to be formed for the purposes, among other things, of using, exercising, and enjoying the said exclusive liberties and privileges in the said two several letters patent in the said condition, and in this plea mentioned, for the use and benefit of the said persons so exceeding the number of five, in that part of the said United Kingdom called England, and in that part thereof called Scotland respectively, under color of the said letters patent respectively, to wit, at, etc., and so the defendant said, that the said supposed writing obligatory was and is void in law, and this the said defendant was ready to verify, wherefore, etc.

The defendant pleaded, sixthly, *actio non*, because certain of the said several letters patent in the said condition of the said supposed writing obligatory mentioned were letters patent of our sovereign lord the now king, under the great seal of the United Kingdom of Great Britain and Ireland, bearing date at Westminster, on a certain day, to wit, March 20th, in the fifth year of the reign of our sovereign lord the king, containing the like matters and things, and the like proviso and to the same effect as the said letters patent in the said fifth plea first mentioned, as by the said letters patent which the said defendant produced to the Court might more fully appear ; and the defendant further said, that the said term of fourteen years in the said last-mentioned letters patent mentioned, at the time of the making of the said supposed writing obligatory, was, and yet is, unexpired, and that the said company in the said condition of the said supposed writing obligatory mentioned was at the time of the making thereof intended by the said plaintiff and defendant to consist of more than five persons, to wit, 10,000 persons, and to be formed for the purpose, among other things, of using, exercising, and enjoying the said exclusive liberties and privileges in the said last-mentioned letters patent mentioned, for the use and benefit of the said persons so exceeding the number of five, in that part of the United Kingdom called England, under color of the said last-mentioned letters patent, by means of which premises in this plea mentioned the said supposed writing obligatory was and is wholly void, and this the said defendant was ready to verify, wherefore, etc.

The defendant pleaded, seventhly and lastly, that certain of the said letters patent in the said condition of the said supposed writing obligatory mentioned were letters patent of our sover-

eign lord the now king, under the great seal of the United Kingdom of Great Britain and Ireland, bearing date at Westminster, on a certain day, to wit, March 20th, in the fifth year of the reign of our said lord the king, containing therein the like matters and things, and the like proviso, and to the same effect, as the said letters patent in the said fifth plea first mentioned, as by the said last-mentioned letters patent, which the said defendant produced to the Court, might more fully appear; and the defendant further said that the said term of fourteen years in the said last-mentioned letters patent mentioned at the time of the making of the said supposed writing obligatory, was, and yet is, unexpired, and that the said company in the said condition of the said supposed writing obligatory mentioned was by the said Jean Jacques Saint Mare, the said Stamp Brooksbank, the said defendant, and the said plaintiff intended at the time of the making the said supposed writing obligatory to consist of more than five persons, and to be formed for the purpose, among other things, of using, exercising, and enjoying the said exclusive liberties and privileges in the said last-mentioned letters patent mentioned, for the use and benefit of the said persons so exceeding the number of five, in that part of the United Kingdom called England, under color of the said letters patent, and of the acting as a corporate body, and dividing the benefit of the said last-mentioned letters patent, and the liberties and privileges thereby granted, into divers shares, exceeding the number of five, to wit, 10,000 shares, to be transferable and assignable, without any charter from our lord the king, and that, before the time of the making of the said supposed writing obligatory, to wit, on, etc., at, etc., it was corruptly and illegally agreed, by and between the said plaintiff and the said Jean Jacques Saint Mare, the said Stamp Brooksbank, and the said defendant, that the said plaintiff should form such company, as in this plea mentioned, for the purpose in this plea mentioned, and should sell and dispose of divers, to wit, 9000 of such shares as in this plea mentioned, being the shares in the said condition of the said supposed writing obligatory mentioned, and should cause divers large sums of money to be subscribed by public subscription by numbers of persons exceeding five, to wit, 9000 persons, in order to the raising a large sum of money, to wit, £450,000, under pretence of carrying on the said liberty or privilege (among other things) by the said last-mentioned letters patent granted; such money to be in part received by the said Jean Jacques Saint Mare, Stamp Brooksbank, and the said defendant, for the purpose of carrying on the said liberty and privilege for the benefit

of the said last-mentioned persons, so exceeding five ; and that the said Jean Jacques Saint Mare, the said Stamp Brooksbank, and the said defendant, should, in consideration thereof, pay to the said plaintiff the sum of £10,000 of lawful money of Great Britain, in the manner in the said condition of the said supposed writing obligatory mentioned ; and that for securing the payment of the sum of £10,000 the said defendant should make and seal, and as his act and deed deliver to the said plaintiff a writing obligatory, in the penal sum of £10,200, conditioned for the payment of the said sum of £10,000 in manner aforesaid ; and the defendant further said, that in pursuance of the said corrupt and unlawful agreement, the said defendant afterward, to wit, on, etc., at, etc., made and sealed, and as his act and deed delivered the said supposed writing obligatory in the said declaration mentioned, and the said plaintiff then and there accepted and received the same of and from the said defendant, upon the said corrupt and unlawful agreement, by means of which premises in this plea mentioned the said supposed writing obligatory was and is wholly void, and this the said defendant was ready to verify, wherefore, etc.

Demurrer *inde*, and joinder.

Wilde in support of the demurrer. The substance of the seventh plea (which comprehends also the matters contained in the fifth and sixth) is, that it was intended by the parties to do certain acts, and, among them, to form a company which should act as a corporate body, and should transfer and assign shares without charter from the crown.

But a mere allegation of intention is not sufficient to show that the bond was void, for the intention to commit an illegal act is not necessarily followed by commission. If such an allegation be sufficient, every existing corporation is open to the same objection, for there is none of which it may not be predicated that before becoming a corporation it intended to become a corporation. The intention, however, might be perfectly legal, for the parties might intend to become a corporation by procuring an act of Parliament for the purpose ; a mode of becoming so, which is recognized in 6 G. 2, ch. 18 ; and when the defendant might have obtained such an act himself, it is not for him to object that the plaintiff did not obtain it ; therefore, in Haines *v.* Busk, 5 Taunt. 521, where, in an action for brokerage, the defence was, that the voyage undertaken was illegal for want of a license, the Court held that as the defendant ought to have procured the license, he should not take advantage of the want of it. Nor is it sufficiently shown that the acts intended were illegal. The defendant

should have specified what the acts were, in order that the Court might judge whether they were acts peculiar to a corporate body or not. The defendant might have been in error in supposing that certain acts which he had in view were exclusively acts of a corporate body.

Acting as a corporate body, for instance, in private matters, would not render the parties liable to a *quo warranto*; as, in the matter of a warren; Rex *v.* Cann, Andr. 15. At all events, by making the allegation in this general way, the defendant offers matters of law to be tried by a jury. He ought to have afforded the plaintiff an opportunity of taking issue on the acts impugned, and on the means by which it might be proposed to justify them. The only act specified is, that it was intended the proposed company should transfer and assign shares without charter from the king. But there is nothing illegal in that. It might have been intended to transfer them under an act of Parliament to be procured for the purpose; and even without that, the mere transfer would not be in itself illegal, but only a symptom that the body transferring was an illegal combination. Rex *v.* Webb and Others, 14 East, 406. The transfer would be legal, if the assignee took it subject to the original covenants. Pratt *v.* Hutchinson, 15 East, 511. A share in a partnership may be sold under an execution, and the assignees of a bankrupt may carry on his trade. At all events a partner may assign the whole of his interest, although it may depend on the terms of the partnership whether the assignee shall carry on business with the others or not.

In Josephs *v.* Pebrer, 3 B. & C. 639, where a contract for shares in a joint stock company was held void, the company was formed; and the case was argued on the provisions of 6 G. 1, ch. 18, which has since been repealed.

Taddy, *contra*.

BEST, C.J., now delivered the judgment of the Court, and after reading the pleadings, and particularly adverting to the condition of the bond, and the terms of the patent, as set forth, *ante*, p. 438, proceeded as follows:

It appears from the condition of the bond that the plaintiff was not entitled to any part of the £10,000, which the obligors had bound themselves to pay him, until he had formed a company, and procured purchasers for 9000 shares, and payment of the first instalments or calls on those shares. The forming the company, the selling 9000 shares of what was to be called the stock of such company, and the prevailing on the purchasers to pay one third of their subscriptions, or £150,000, is a condition precedent to the plaintiff's right of action.

The proviso contained in the patent shows that the plaintiff cannot perform this condition without committing a fraud on a vast number of persons, and that if he could obtain any subscriptions, the subscribers would be entitled to recover back the money paid on them, as being obtained by fraud, or as money paid without consideration. The moment the company was formed, and the patents were transferred to them, they would cease to exist as legal patents, for they would be destroyed by any assignment to more than five persons, or to any persons in trust for more than five persons. The condition of the bond shows that the patents were to be assigned to a company to be formed by subscription, and the shares in which were to be transferable. Any one of these circumstances would render the patents void. This difficulty was felt by the counsel for the plaintiff, and he attempted to extricate his client from it by insisting that it was not intended to convey the exclusive right of distilling spirits from potatoes, secured by the patent, but only to free the intended company from being liable to the patentee for using his invention. But it is clear from the terms of the bond that the object of the parties was not to destroy the patents, but that they professed to assign the privilege granted by them to the company which the plaintiff was to form.

The words of the condition of the bond are, "have it in contemplation to dispose of their interest of, in, and to the several patents, and of, in, and to the premises and stock in trade, and to part with the same to a company." These terms indicate an intention not to destroy, but to transfer unimpaired the monopoly secured by the patents. But it has been said it does not appear from the pleadings that the plaintiff knew of this proviso in the patents, and that the insertion of such a proviso in patents is not required by any law. But we must presume that he knew the contents of the patents referred to by the bond on which he brings his action ; of the patents which, it appears by the same bond, he undertakes the sale in the manner stated in that bond. Every man who undertakes to do a thing must be presumed to know what he undertakes, unless he can show that he has been deceived by the other party. How could he undertake to negotiate for the sale of the patents, unless he had seen them and knew their contents ?

If the plaintiff knew the terms on which the patents were granted, he must know that what he undertook to do could not be done. As he cannot legally perform his part of the contract, he never can be in a condition to recover the compensation stipulated to be paid on its full and complete performance.

There are some old authorities which say, that if a man binds himself by the condition of his bond to do what at the time he executed the bond it was impossible for him to do, the bond shall be considered as without condition, and the obligee may recover the penalty. These authorities are rather opposed to the plaintiff's claim ; they apply only to cases where there is nothing to be done by the obligee ; here the plaintiff must do something before the bond can be enforced. If what he is to do can never be legally done, the instrument must be inoperative. The plaintiff not having performed the first condition, can never have a right of action on it. The situation of the plaintiff in this case is like that of the defendants in the cases alluded to. It is his fault that he has undertaken what he cannot perform. In Pullerton *v.* Agnew, 1 Salk. 172, Holt, C.J., said : " Where the condition is underwritten or endorsed, there that only is void, and the obligation is single, but where the condition is part of the lien itself, and incorporated therewith, if the condition be impossible, the obligation is void." In the case before us, the service of the plaintiff, and payment for it by the defendant, are incorporated together, and if the service cannot be performed, the whole instrument is a nullity.

But it is apparent from the facts disclosed by the condition of this bond and the patents that the scheme in which the parties to this action were engaged was one of those bubbles by which, to the disgrace of the present age, a few projectors have obtained the money of a great number of ignorant and credulous persons, to the ruin of those dupes and their families, and by which a passion for gambling has been excited, that has been most injurious to commerce and to the morals of the people.

What any one must discover from reading the instruments, the parties to them must be fully informed of. It cannot be too well known that there is no place for persons engaged in such transactions in courts appointed for the decision of civil causes. Although the statute of 6 G. 1 be repealed, the common law relating to such schemes is expressly reserved by the repealing statute, and no one doubts, if it can be shown, as it easily may, that such schemes are fraud-traps, and injurious to the public welfare, that the forming of them is an indictable offence at the common law.

The seventh plea states, and the demurrer admits, that the plaintiff and the defendant intended that the company which the plaintiff undertook to form should act as a corporate body without any charter from the king, and that the benefit of the letters patent were to be enjoyed by this pretended corporate

body, and that the capital of this body was to be divided into 10,000 shares, which were to be transferable and assignable.

It has been said at the bar, that the parties might intend to obtain an act of Parliament to give this body a legal existence. Nothing of this intention appears on the record.

It has been further said that the defendant should have shown how the parties intended to act as a corporation. If this is not correctly pleaded, advantage should have been taken of the technical defect by special demurrer. If what they intended to do would not have been acting as a corporation, they should have traversed the plea. By demurring, the plaintiff has confessed himself guilty of intending to form a company that was to act as a corporation.

But the shares were to be transferable. There can be no transferable shares of any stock except the stock of corporations or of joint-stock companies created by acts of Parliament. When it is said the shares were to be transferable, that must mean, that the assignee was to be placed in the precise situation that the assignor stood in before the assignment; that the assignee was to have all the rights of the assignor, and to take upon him all his liability. Now the assignee can join in no action for a cause of action that accrued before the assignment. Such rights of action must still remain in the assignor, who, notwithstanding he has retired from the company, will still remain liable for every debt contracted by the company before he ceased to be a member. Indeed, the members of corporations cannot assign their interest, and force their assignees into the corporation without the authority of an act of Parliament. Such authority is expressly given by the bank acts, the South Sea acts, and by other statutes creating companies that possessed stock, which it was deemed proper to be rendered transferable.

The pretending to be possessed of transferable stock is pretending to act as a corporation, and pretending to possess a privilege which does not belong to many corporations. But this is put only as one of the proofs of the intention of the projectors of this company that it should act as a corporation. It is not necessary on these pleadings to decide whether the forming a company with such shares is of itself, without other circumstances, pretending to act as a corporation, because it is by the pleadings distinctly admitted that the plaintiff and defendant intended that the company should act as a corporation. Persons who, without the sanction of the legislature, presume to act as a corporation, are guilty of a contempt of the king, by usurping on his prerogative. By the 9th of Anne, ch. 20,

the Court may not only give judgment of ouster, but may fine a defendant convicted on a *quo warranto*. This shows that the usurpation is considered as a criminal act. But it has been insisted that the usurpation is only criminal where a party, without authority, acts in a public office, and that the pretended corporation which these parties were to set up did not affect the public, but was a scheme with which certain individuals only were connected. Most of the statutes relative to *quo warrantos*, from the statute of Gloucester down to the 9th of Anne inclusive, have the words offices and franchises. Franchises are privileges for the advantage of individuals. In Com. Dig. title "Quo Warranto," many things are mentioned as matters for which *quo warranto* will lie, which are valuable only to the individuals who claim them against the crown, and are not connected with any public duty. But it concerns the public that bodies, composed of a great number of persons with large disposable capitals, should not be formed without the authority of the crown, and subject to such regulations as the king in his wisdom may deem necessary for the public security.

The acting as such a corporation, without charter from the crown, is contrary to law, and no man can maintain an action on a bond given to secure payment of a compensation to the obligee for the formation of any such pretended corporations. For these reasons judgment must be for the defendant.

Judgment for defendant accordingly.

PINDAR *v.* UPTON.

IN THE SUPREME JUDICIAL COURT OF NEW HAMPSHIRE, DECEMBER, 1862.

[*Reported in* 44 *New Hampshire* 358.]

IN Debt. The writ contains two counts upon a bond, given by the defendants to the plaintiff, dated April 19th, 1861, for $250. The first count sets out the obligation only ; the second states the obligation and the condition, as follows : "That the said Ellis A. Upton shall, within one year from the date of the said writing obligatory, apply to the proper authorities, and be permitted to take and actually take the oath or affirmation prescribed by law for the relief of poor debtors ; or, in default thereof, surrender himself to prison, as prescribed by law, then the said obligation to be void."

The parties agree to the following statement of facts: In November, 1860, Ellis A. Upton was arrested upon a writ of mesne process, issued from this Court, in favor of James S. Pindar, and John L. Goldsmith became his bail, by placing his name upon the writ as such. At the April Term, 1861, Goldsmith surrendered Upton in Court, and was discharged from his liability as bail. While Upton was in the custody of the sheriff, he tendered to the plaintiff the bond in suit, and claimed to be released. The plaintiff objected that the bond was not the proper method by which to obtain Upton's release. Upton insisted that it was the proper and legal method, and finally induced the plaintiff to accept this bond, which he did, and directed the sheriff to release Upton.

At the April Term, 1862, the plaintiff recovered judgment against Upton for $134.40 debt, and $27.82 costs, being $162.22, and took out execution for the same, and delivered it to the sheriff, who, on or about August 6th, 1862, orally notified Goldsmith and Sceggell that he held said execution, and wanted them to produce the body of said Upton; but he gave to them no writing, nor made any demand of his fees for his services; and the said Goldsmith and Sceggell afterward, and before the return day of said execution, produced the body of said Upton to said sheriff, that he might arrest said Upton; and the sheriff declined, and said that he should not arrest him; and the sheriff returned the execution into Court in no part satisfied.

The suit of Pindar *v.* Upton was continued from term to term from the entry, till, at the request of Upton, the judgment was rendered, April 23d, 1862. The "year" mentioned in the condition of the bond expired April 18th, 1862.

Upton did not perform nor attempt to perform the conditions of the bond, or any of them.

The plaintiff claims to recover such damages as he can show he has suffered by reason of said Upton not making disclosure; while the defendant denies the validity of the bond. If the plaintiff can maintain his action, damages are to be assessed at the trial Term.

C. F. Hill for the plaintiff.

S. B. Carter and *L. D. Sawyer* for the defendants.

BELL, C.J. The authorities collated with much industry by the counsel for the plaintiff satisfactorily show that obligations taken from a person in the custody of a sheriff are not invalid, or illegal as taken for ease and favor, unless they are made to himself. If an obligation is taken to the creditor, and is voluntarily offered by the prisoner, it will be held valid at common law; but if it is extorted by duress, or any abuse of

legal process, and imposes conditions more onerous than those imposed by the statute, it may be avoided ; and where such an obligation is forbidden by statute it is void.

The bond in suit here is such a voluntary bond. No statute declares it to be void, or forbids it to be taken. No duress or abuse of process is suggested. It may well be held a valid bond at common law.

At first look the condition of this bond seems impossible, because, in the condition of the plaintiff's case, when it was taken, it was not in the power of the obligor to apply to the proper authority and be admitted to take and actually take the oath or affirmation prescribed by law for the relief of poor debtors, since no tribunal had any jurisdiction or proper authority to administer such oath to any person but one taken in execution, or who had been taken in execution, and had been discharged on giving bond like that given in this case ; and here no judgment had been rendered, and no execution had issued, and the obligor had been arrested on mesne process only. For a like reason it was not in the obligor's power to surrender himself to prison, in conformity to any law, since there is no law applicable to such a case. If this impression was correct the bond must be regarded as single, and the whole amount of the penalty recoverable, since an impossible condition is regarded as none, and the bond therefore unconditional. Touchstone, 133 ; Co. Litt. 206, *a*, *b* ; Com. Dig., Condition, D. 1. It was, nevertheless, in the power of the obligor to perform one alternative of this condition, by the aid of the obligee, and that is sufficient to prevent its being regarded as impossible.

If the obligor had allowed judgment to be rendered against him, and an execution to issue, he might have been surrendered to the officer in charge of the execution, and have given a new bond, and then, within the year prescribed by this bond, he might have taken the poor debtor's oath, though he could not have surrendered himself at the jail, since that could only be done on the day next after the expiration of the year. If there are two conditions in the alternative, one of which is, at the execution of the bond, impossible, the condition of the bond will be broken, if the other is not performed, or its performance is not prevented by some valid reason. Laughter's Case, 5 Co. 22.

It is apparent that the condition to take the poor debtor's oath, though possible, could not be performed without the assent and concurrence of the plaintiff. No judgment could be rendered, no execution could issue without his agency ; the execution could not be placed in an officer's hands, nor any

service made upon it, but by his direction. Now it is a settled principle, that wherever, by the terms or by the nature of a condition, it cannot be performed without the precedent, or concurrent act of the obligee, and he neglects or refuses to perform such act, the condition is saved. Com. Dig., Cond., I., 6, 7 ; Bac. Ab., Cond., 23 ; Co. Litt. 206, *b* ; 210, *b* ; Touch. 380, 1 ; Vin. Ab., Cond., N., *c* ; 2 Cruise Dig. 33 ; United States *v.* Arredondo, 6 Pet. 691 ; Whitney *v.* Spencer, 4 Cow. 39.

The action of Pindar *v.* Upton was continued, as the case finds, at the request of the defendant, to the April Term, 1862, which commenced April 15th, and the year limited in the bond expired April 18th. It was consequently impossible that the execution should be issued, and served, and notice given, so that the oath could be taken on or before the 18th. The last continuance of the action then prevented the oath from being taken, or rather rendered it impracticable to take it. If the plaintiff assented to that continuance, the condition of the bond is not broken. Upon this point the case shows nothing definite, and nothing can be decided. If the plaintiff did not assent, and the defendant obtained the continuance against his objection, the obligor has disabled himself to perform the condition, and is chargeable with the breach of it.

The plaintiff claims that he is entitled to recover the amount of his debt and interest, as damages, if there has been a breach of the condition ; and he ought clearly to do so, if he has been injured to that amount. But there is no evidence of such loss, or of any specific damage. For all that appears, the defendant is as well able to pay his debt as when the bond was taken, in which case the only injury is the loss occasioned by the delay ; or he may have been then and still entirely insolvent, and the damages nominal.

Case discharged.

TAYLOR *v.* TAINTOR, Treasurer.

In the Supreme Court of the United States, December Term, 1872.

[*Reported in* 16 *Wallace* 366.]

In error to the Supreme Court of Errors of the State of Connecticut ; in which Court William Taylor, Barnabas Allen, and one Edward McGuire were plaintiffs in error, and Taintor, Treasurer of the State of Connecticut, was defendant in error.

The case arose under that clause of the Federal Constitution[1] which ordains that

"A person charged in any State with treason, felony, or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime,"

and under the act of Congress passed February 12th, 1793. to carry into effect this provision, and which makes it the duty of the executive of the State or Territory to which a person charged with one of the crimes mentioned has fled, upon proper demand to cause the fugitive to be arrested and delivered up.

M. W. Seymour for the plaintiff in error.

S. B. Beardsley and *N. L. White, contra.*

SWAYNE, J., stated the facts of the case and delivered the opinion of the Court.

This is a writ of error, issued under the 25th section of the Judiciary Act of 1789, to the Supreme Court of Errors of the State of Connecticut.

The attorney of the State for the county of Fairfield presented to the Superior Court for that county, at the August Term, 1866, an information charging Edward McGuire with the crime of grand larceny. A bench warrant, returnable to the same Term, was thereupon issued. McGuire was arrested and held in custody. The Court fixed the amount of bail to be given at $8000. On September 24th, 1866, McGuire and the other plaintiffs in error entered into a recognizance to the defendant in error in that sum, conditioned that McGuire should appear before the Superior Court, to be held at Danbury, in Fairfield County, on the third Tuesday of October, 1866, to answer to the information before mentioned, and abide the order and judgment of the Court. McGuire was thereupon released from custody. He failed to appear according to the condition of the recognizance, and it was duly forfeited on October 16th, 1866.

This suit was thereupon instituted in the Superior Court of Fairfield County to recover the amount of the obligation. The facts developed at the trial, and relied upon by the defendants to defeat the action, were, according to the practice in that State, found and certified by the Court, and became a part of the record. So far as it is necessary to state them, they are as follows :

After the recognizance was entered into McGuire went into the State of New York, where he belonged. While there, upon

[1] Art. 4, § 2.

a requisition from the governor of Maine upon the governor of New York, he was seized by the legal officers of New York, and was by them forthwith, on October 19th, 1866, delivered over to the proper officers of the State of Maine, by whom he was immediately and against his will removed to that State. The requisition charged a burglary alleged to have been committed by McGuire in Maine before the recognizance in question in this case was taken. At the time of the forfeiture of the recognizance McGuire was, and he has been ever since, legally imprisoned in Maine. In June, 1867, he was tried there for the burglary charged in the requisition, and convicted and sentenced to confinement in the penitentiary for fifteen years, and was, at the time of the trial of this case in the Court below, serving out his time under that sentence. Neither of the sureties knew, when they entered into the recognizance, that there was any charge of crime against McGuire other than the one alleged in the information in Connecticut. If the testimony were admissible, the plaintiff proved that the sum of $8000 was placed in the hands of the sureties to indemnify them against the liability they assumed, and if the testimony were admissible, the sureties proved that the money was not placed in their hands by McGuire, nor by any one in his behalf; and that, so far as the sureties knew, it was done without his knowledge.

The Superior Court gave judgment for the plaintiff. The defendants thereupon removed the case to the Supreme Court of Errors for Fairfield County. That Court affirmed the judgment, and the defendants thereupon brought this writ of error.

The fact that the sureties were indemnified was proper to be considered by the Superior Court upon an application for time to produce the body of McGuire.[1] But it could have no effect upon the rights of the parties in this action, and may therefore be laid out of view.

It is the settled law of this class of cases that the bail will be exonerated where the performance of the condition is rendered impossible by the act of God, the act of the obligee, or the act of the law.[2] Where the principal dies before the day of performance, the case is within the first category. Where the Court before which the principal is bound to appear is abolished without qualification, the case is within the second. If

[1] Bank of Geneva *v.* Reynolds, 12 Abbott's Practice Reports, 81; Same *v.* Reynolds, *et al.*, 20 Howard's Practice Reports, 18.

[2] People *v.* Bartlett, 3 Hill, 571; Coke Littleton, 206, *a*; Bacon's Abridgment, tit. "Conditions," (2); Viner's Abridgment, tit. "Condition," (Gc.) pl. 18, 19, and (I. c.) pl. 16; Hurlstone on Bonds, 48.

the principal is arrested in the State where the obligation is given and sent out of the State by the governor, upon the requisition of the governor of another State, it is within the third.[1] In such cases the governor acts in his official character, and represents the sovereignty of the State in giving efficacy to the Constitution of the United States and the law of Congress. If he refuse, there is no means of compulsion.[2] But if he act, and the fugitive is surrendered, the State whence he is removed can no longer require his appearance before her tribunals, and all obligations which she has taken to secure that result thereupon at once, *ipso facto*, lose their binding effect. The authorities last referred to proceed upon this principle.

It is equally well settled that if the impossibility be created by the obligor or a stranger, the rights of the obligee will be in nowise affected.[3] And there is "a distinction between the act of the law proper and the act of the obligor, which exposes him to the control and action of the law."[4] While the former exonerates, the latter gives no immunity. It is the willing act of the obligor which creates the obstacle, and the legal effect is the same as of any other act of his, which puts performance out of his power. This applies only where the accused has been convicted and sentenced. Before judgment—*non constat*—but that he may be innocent.

Where a State Court and a Court of the United States may each take jurisdiction, the tribunal which first gets it holds it to the exclusion of the other, until its duty is fully performed and the jurisdiction invoked is exhausted; and this rule applies alike in both civil and criminal cases.[5] It is indeed a principle of universal jurisprudence that where jurisdiction has attached to person or thing, it is—unless there is some provision to the contrary—exclusive in effect until it has wrought its function.

Where a demand is properly made by the governor of one State upon the governor of another, the duty to surrender is not absolute and unqualified. It depends upon the circumstances of the case. If the laws of the latter State have been put in force against the fugitive, and he is imprisoned there,

[1] State *v.* Allen, 2 Humphreys, 258; Devine *v.* State, 5 Sneed, 626; State *v.* Adams, 3 Head, 260.

[2] Kentucky *v.* Dennison, 24 Howard, 66.

[3] People *v.* Bartlett, 3 Hill, 570.

[4] United States *v.* Van Fossen, 1 Dillon, 409.

[5] Hagan *v.* Lucas, 10 Peters, 400; Taylor *v.* Carryl, 20 Howard, 584; Troutman's case, 4 Zabriskie, 634; *Ex parte* Jenkins & Crosson, 2 American Law Register, 144.

the demands of those laws may first be satisfied. The duty of obedience then arises, and not before. In the case of Troutman, cited *supra*, the accused was imprisoned in a civil case. It was held that he ought not to be delivered up until the imprisonment had legally come to an end. It was said that the Constitution and law refer to fugitives at large, in relation to whom there is no conflict of jurisdiction.

The law which renders the performance impossible, and therefore excuses failure, must be a law operative in the State where the obligation was assumed, and obligatory in its effect upon her authorities. If, after the instrument is executed, the principal is imprisoned in another State for the violation of a criminal law of that State, it will not avail to protect him or his sureties. Such is now the settled rule.[1]

When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him and deliver him up in their discharge; and if that cannot be done at once, they may imprison him until it can be done. They may exercise their rights in person or by agent. They may pursue him into another State; may arrest him on the Sabbath; and, if necessary, may break and enter his house for that purpose. The seizure is not made by virtue of new process. None is needed. It is likened to the rearrest by the sheriff of an escaping prisoner.[2] In 6 Modern[3] it is said: "The bail have their principal on a string, and may pull the string whenever they please, and render him in their discharge." The rights of the bail in civil and criminal cases are the same.[4] They may doubtless permit him to go beyond the limits of the State within which he is to answer, but it is unwise and imprudent to do so; and if any evil ensue, they must bear the burden of the consequences, and cannot cast them upon the obligee.[5]

In the case of Devine *v.* The State,[6] the Court, speaking of

[1] Withrow *v.* The Commonwealth, 1 Bush. (Kentucky), 17; United States *v.* Van Fossen, 1 Dillon, 406; Devine *v.* The State, 5 Sneed, 625; United States *v.* French, 1 Gallison, 1; Grant *v.* Fagan, 4 East, 190.

[2] 3 Blackstone's Commentaries, 290; Nicolls *v.* Ingersoll, 7 Johnson, 152; Ruggles *v.* Corry, 3 Connecticut, 84, 421; Respublica *v.* Gaoler, 2 Yeates, 263; 8 Pickering, 140; Boardman & Hunt *v.* Fowler, 1 Johnson's Cases, 413; Commonwealth *v.* Riddle, 1 Sergeant & Rawle, 311; Wheeler *v.* Wheeler, 7 Massachusetts, 169.

[3] Page 231, Case 339, Anon.

[4] Harp *v.* Osgood, 2 Hill, 215.

[5] Devine *v.* The State, 5 Sneed, 625; United States *v.* Von Fossen, 1 Dillon, 410; Respublica *v.* Gaoler, 2 Yeates, 265, cited *supra*.

[6] 5 Sneed, 625.

the principal, say, "The sureties had the control of his person; they were bound at their peril to keep him within their jurisdiction, and to have his person ready to surrender when demanded. . . . In the case before us, the failure of the sureties to surrender their principal, was, in the view of the law, the result of their own negligence or connivance, in suffering their principal to go beyond the jurisdiction of the Court and from under their control." The other authorities cited are to the same effect.

The plaintiffs in error were not entitled to be exonerated for several reasons:

When the recognizance was forfeited for the non-appearance of McGuire, the action of the governor of New York, pursuant to the requisition of the governor of Maine, had spent its force and had come to an end. McGuire was then held in custody under the law of Maine to answer to a criminal charge pending there against him. This, as already stated, cannot avail the plaintiffs in error. The shortness of the time that intervened between the arrest in New York and the imprisonment in Maine on the one hand, and the failure and forfeiture in Connecticut on the other, are entirely immaterial. Whether the time were longer or shorter—one year or one day—the legal principle involved is the same, and the legal result must be the same.

If McGuire had remained in Connecticut he would probably not have been delivered over to the authorities of Maine, and would not, therefore, have been disabled to fulfil the condition of his obligation. If the demand had been made upon the governor of Connecticut, he might properly have declined to comply until the criminal justice of his own State had been satisfied. This right, it is not to be doubted, he would have exercised. Had he failed to do so, the obligation of the recognizance would have been released. The plaintiffs in error are in fault for the departure from Connecticut, and they must take the consequences. But their fault reached further. Having permitted their principal to go to New York, it was their duty to be aware of his arrest when it occurred, and to interpose their claim to his custody.[1]

We have shown that when McGuire was arrested in New York the original imprisonment, under the information in Connecticut, was continued; that the bail had a right to seize him wherever they could find him; that the prosecution in Connecticut was still pending, and that the Superior Court having acquired jurisdiction, it could neither be arrested nor

[1] Alguire *v.* The Commonwealth, 3 Ben. Monroe, 349, 351.

suspended *in invitum* by any other tribunal. Though beyond the jurisdiction of Connecticut, he was still through his bail in the hands of the law of that State, and held to answer there for the offence with which he was charged. Had the facts been made known to the executive of New York by the sureties at the proper time, it is to be presumed he would have ordered McGuire to be delivered to them and not to the authorities of Maine. The result is due, not to the Constitution and law of the United States, but to their own supineness and neglect. Under the circumstances they can have no standing in Court to maintain this objection.

The act of the governor of New York, in making the surrender, was not "the act of the law" within the legal meaning of those terms; but in the view of the law was the act of McGuire himself. He violated the law of Maine, and thus put in motion the machinery provided to bring him within the reach of the punishment denounced for his offence. But for this that machinery, so far as he was concerned, would have remained dormant. To hold that the surrender was the act of the law, in the sense contended for, would be as illogical as to insist that the blow of an instrument used in the commission of a crime of violence is the act of the instrument and not of the criminal. It is true that in one case there would be a will and purpose as to the result in question, which would be wanting in the other, but there would be in both, the relation of cause and effect, and that is sufficient for the purposes of the analogy. The principal in the case before us cannot be allowed to avail himself of an impossibility of performance thus created; and what will not avail him cannot avail his sureties. His contract is identical with theirs. They undertook for him what he undertook for himself. The act of the governor of New York was the act of a stranger.

It is true that the constitutional provision and the law of Congress, under which the arrest and delivery were made, are obligatory upon every State and a part of the law of every State. But the duty enjoined is several and not joint; and every governor acts separately and independently for himself. There can be no joint demand and no joint neglect or refusal. In the event of refusal, the State making the demand must submit. There is no alternative. In the case of McGuire no impediment appeared to the governor of New York, and he properly yielded obedience. The governor of Connecticut, if applied to, might have rightfully postponed compliance. If advised in season he might have intervened and by a requisition have asserted the claim of Connecticut. It would then

have been for the governor of New York to decide between the conflicting demands. Whatever the decision—if the proceedings were regular—it would have been conclusive. There could have been no review and no inquiry going behind it.[1] We cannot hold that Connecticut was in any sense a party or consenting to what was done in New York. It follows that if McGuire had been held in custody in New York, at the time fixed for his appearance in Connecticut, it would not in anywise have affected the obligation of the recognizance.

A different doctrine would be fraught with mischief. It could hardly fail, by fraud and connivance, to lead frequently to abuses, involving the escape of offenders of a high grade, with pecuniary immunity to themselves and their sureties. Every violation of the criminal laws of a State is within the meaning of the Constitution, and may be made the foundation of a requisition.[2] Hence the facility of escape if this instrumentality could be used to effect that object. The rule we have announced guards against such results.

The supposed analogy between a surrender under a treaty providing for extradition and the surrender here in question has been earnestly pressed upon our attention. There, the act is done by the authorities of the nation—in behalf of the nation—pursuant to a national obligation. That obligation rests alike upon the people of all the States. A national exigency might require prompt affirmative action. In making the order of surrender, all the States, through their constituted agent, the General Government, are represented and concur, and it may well be said to be the act of each and all of them. Not so here.

The judgment of the Supreme Court of Errors of Connecticut is

Affirmed.

DAVIS and HUNT, JJ., did not sit.

FIELD, J. (with whom concurred CLIFFORD and MILLER, JJ.), dissenting.

I am unable to concur in the judgment rendered by the majority of the Court in this case. I agree with them that sureties on a recognizance can only be discharged from liability by the performance of the condition stipulated, unless that become impossible by the act of God, or of the law, or of the obligee. But I differ from them in the application of their

[1] The matter of Clark, 9 Wendell, 221; *Ex parte* Jenkins & Crosson, *supra*, p. 370, note ‖.

[2] Kentucky *v.* Dennison, 24 Howard, 66; Certain Fugitives, 24 Law Magazine, 226.

term *act of the law*. If I understand correctly their opinion, they limit the term to a proceeding authorized by a law enacted by the State where the recognizance was executed. I am of opinion that the term will also embrace a proceeding authorized by any law of the United States. A proceeding sanctioned by such law, which renders the performance of the condition of the recognizance impossible, ought, in my judgment, upon plain principles of justice and according to the authorities, to release the sureties.

The Constitution of the United States declares its own supremacy, and that of the laws made in pursuance of it, and of treaties contracted under the authority of the United States. As the supreme law of the land they are, of course, to be enforced and obeyed, however much they may interfere with the law or constitution of any State.

Now the Constitution provides that "a person charged in any State with treason, felony, or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime."[1] The act of Congress of February 12th, 1793, was passed to carry into effect this provision, and has made it the duty of the executive of the State or Territory to which a person charged with one of the crimes mentioned has fled, upon proper demand to cause the fugitive to be arrested and delivered up. In pursuance of this act the principal on the recognizance in suit was arrested by order of the governor of New York, and delivered up as a fugitive from justice to the officers of the State of Maine. By them he was taken to that State, and having been previously indicted for a felony, was there tried, convicted, and sentenced to the penitentiary for fifteen years. Thus in the execution of a valid law of the United States, passed to carry out an express constitutional provision, the prisoner was taken against his will from the custody of his bail, and placed in the custody of officers of another State, from whom the bail could not recover him to make a surrender pursuant to the condition of their recognizance. It is no answer to say that the prisoner, when called in Connecticut, was detained by the State of Maine, and not by any proceeding or order under an act of Congress, because that proceeding or order had been executed, and was no longer operative. He was taken out of the custody and placed beyond the reach of his bail by a proceeding under the act, and

[1] Art. 4, § 2.

therefore to such proceeding their inability to surrender him must be attributed.

The case is not essentially different from a surrender of a fugitive from justice under an extradition treaty. The United States have such treaties with several European nations, and whatever may have been the extravagant doctrines respecting the rights of the States, at one time in some parts of the country, it will not now be pretended that with the enforcement of such treaties any State, by her laws or judicial proceedings, can interfere. If the fugitive, after his arrival in this country, should commit a crime and be held to bail, it would be a question with the authorities of the General Government whether he should be surrendered under the treaty ; but if surrendered it would be manifestly unjust to the bail to hold them to the performance of the conditions of the recognizance.

It seems to me that it would be a more just rule to hold, that whenever sureties on a recognizance are rendered unable to surrender their principal, because he has been taken from their custody without their assent, in the regular execution of a law or treaty of the United States, their inability thus created should constitute for their default a good and sufficient excuse. The execution of the laws and treaties of the United States should never be allowed in the Courts of the United States to work oppression to any one.

COMMONWEALTH *v.* OVERBY.

IN THE COURT OF APPEALS OF KENTUCKY, APRIL 1, 1882.

[*Reported in* 80 *Kentucky* 208.]

P. W. Hardin for appellant.

Feland & Sebree and *G. R. Champlin* for appellee.

LEWIS, C.J., delivered the opinion of the Court.

On November 19th, 1880, appellee executed a bail bond for the appearance of John H. Overby in the Christian Circuit Court at its ensuing February Term to answer the charge of passing a counterfeit United States Treasury note ; but the defendant having failed to appear, the bond was forfeited, and summons issued against appellee.

In his response he alleged the following facts which are conceded : That on the day following the execution of the bail bond, Overby was arrested by an officer of the United States,

and carried before a United States commissioner, and by him held to appear and answer at the next Term thereafter of the United States Circuit Court held in the city of Louisville, the same charge for which he had been required to appear and answer in the State Court; that failing to give bail, he was committed to the jail of Jefferson County, where he remained until February, 1881, when he was indicted, tried, and convicted in the United States Court for the offence, and sentenced to confinement in the penitentiary of the State of New York for the term of five years.

The court below having overruled the demurrer to the response, and dismissed the proceedings against appellee, the Commonwealth prosecutes this appeal.

By the terms of the bail bond in such cases, the bail undertakes that the defendant shall appear in court at the time and place designated, to answer the charge upon which he is in custody, and at all times render himself amenable to the orders and process of the Court in the prosecution of the charge; or, if he fail to perform either of these conditions, that the bail will pay to the Commonwealth the sum at which the penalty is fixed.

But it is expressly provided by law that the bail may, at any time before the forfeiture of the bond, surrender the defendant to the jailer of the county in which the prosecution is pending, and be thereupon exonerated; and, for the purpose of surrendering him, the bail at any time before judgment against him, and at any place within the State, may arrest the defendant; or, by an indorsement upon a certified copy of the bail bond, may direct the arrest to be made by any peace officer of the State, or by any other person over twenty-one years of age, designated in the indorsement; and it is also provided that if, before judgment is entered against the bail, the defendant be surrendered or arrested, the Court may, at its discretion, remit the whole or part of the sum specified in the bail bond.

There is, therefore, in the bail bond an implied undertaking on the part of the Commonwealth that the bail shall not be hindered or prevented by herself, or by any other authority within the limits of the State, in surrendering the defendant before the forfeiture of the bond, and the further undertaking that the Commonwealth has the power through her peace officers to arrest the defendant if within the State, and will so arrest him at any time before judgment against the bail, when he shall so direct.

It has accordingly been held by this Court that when the Commonwealth, by her own act, prevents the appearance of the defendant in discharge of the bail bond or recognizance,

she should not enforce the penalty against the bail for non-compliance. Alquin *v.* Commonwealth, 3 B. M., 349 ; Kirby *v.* Commonwealth, 1 Bush, 114.

Although in this case the bail was not deprived of his right to surrender the defendant, and thus to become exonerated by the Commonwealth, he was effectually prevented exercising that right, as was the defendant prevented appearing in discharge of the bail bond by the United States Government ; and, in our opinion, it does not make any difference whether the non-appearance of the defendant in compliance with the bail bond be caused by the Commonwealth or by the United States Government ; for the authority of neither can be resisted by the bail or by the defendant, and in both cases the bail is deprived of the aid and protection of the Commonwealth, to which, under the contract, he is entitled.

Upon principle, as well as according to the weight of authority in this State, the facts set forth in the response by appellee constitute a sufficient defence to the proceeding against him, and the demurrer was properly overruled.

In the case of the Commonwealth *v.* Terry, 2 Duvall, 383, it was held by this Court that, in a proceeding against the surety upon a forfeited recognizance, it was a sufficient defence that the defendant, being a soldier in the Federal army, was refused a furlough, and, by reason thereof, was unable to appear in discharge of the recognizance ; and in the case of the Commonwealth *v.* Webster, etc., 1 Bush, 616, it was held that the defendant, having been arrested by a provost marshal and taken from the county where the prosecution against him was pending, the bail should not be made liable upon the bail bond, because he was, by the United States officer, deprived of the power to surrender the defendant.

But the case of the Commonwealth *v.* House, 13 Bush, 680, though the facts are not fully set forth, appears to be somewhat in conflict with the two just referred to. In that case it is conceded that if the Commonwealth, before the time stipulated for his appearance, arrests the principal and detains him at another place, so that he cannot appear at the time and place mentioned in the bail bond, the bail is exonerated ; but it is intimated that the bail would not be exonerated when the principal is arrested and detained by the United States Government.

Perceiving no reason why the bail should be exonerated in the one case and not in the other, we must adhere to the doctrine announced in the two cases in 2 Duvall and 1 Bush, *supra*, and overrule the case in 13 Bush, *supra*, so far as it is inconsistent with this opinion.

But there is another ground upon which the bail in this case should be exonerated.

The object of a bail bond or recognizance is to secure the appearance of the defendant in the Court having jurisdiction, that he may answer the charge against him, and, if convicted, render himself in execution thereof.

Manifestly, the defendant in this case could not have been tried and convicted, even if present, in the Christian Circuit Court, after having been tried and convicted of the same offence in the United States Circuit Court. For, though tried by the United States Court, still it was the same offence for which he was held to answer in the State Court, denounced alike by the laws of the United States and of this State.

The judgment is affirmed.

LAUGHTER'S CASE.

IN THE KING'S BENCH, TRINITY TERM, 1595.

[*Reported in* 5 *Reports* 22.]

THOMAS EATON, Esquire, and Roger Monox, Gentleman, brought an action of debt on a bond of £400, bearing date September 26th, 26 Eliz., against Thomas Laughter. The defendant demanded oyer of the bond and condition; and it appeared by the bond, that Richard Ramsford was also bound in the said bond with the defendant jointly and severally; and the condition was in effect "that if the within bounden Richard Ramsford after lawful marriage had between him and Jane Gilman, wife of Henry Gilman, deceased, and together with the said Jane, do and shall lawfully sell and alien in fee simple, or fee tail, all the great messuage with the little tenement thereunto adjoining, of the said Jane, situate in London, now in the occupation of William Fitzw., Esquire, if then the said Richard Ramsford do or shall either in his lifetime purchase to the said Jane, and her heirs and assigns, lands, tenements, and hereditaments, of as good right, and of as good value, as the money by him received or had by or upon his sale or alienation of the premises, shall amount unto: or else do or shall leave unto her, the said Jane, as executrix, or by legacy, or other good assurance or conveyance, as much money as shall be by him received upon such, etc., that then, etc." And pleaded that the said Richard Ramsford married the said Jane,

December 1st, *anno* 27, and that the said Jane died August 8th, 31, and the said Richard Ramsford survived her; the plaintiff showed by way of replication, that the said Ramsford and Jane, Pasch. 30 Eliz. for £320 levied a fine of the premises to John Thompson and William Kerwen, and to the heirs of John Thompson; and that the said Ramsford did not purchase lands, tenements, or hereditaments, of the value of £320 to the said Jane and her heirs, *neque reliquit præd Jane post decessum ipsius Rich. ut executrici*, etc. And on this plea the defendant's counsel did demur in law. And on great deliberation, judgment was given by Popham, C.J., and the whole Court against the plaintiff; and the reason and cause of the judgment was, that where a condition of a bond consists on two parts in the disjunctive, and both are possible at the time of the bond made, and afterward one of them becomes impossible by the act of God, the obligor is not bound to perform the other part; for the condition is made for the benefit of the obligor, and shall be taken beneficially for him, and he hath election to perform the one or the other for the saving of the penalty of his bond; and when one part is become impossible by the act of God, it is as beneficial for him as if that part of the disjunctive, which is become impossible, had been only the condition of the bond; and so when one became impossible by the act of God, which by no industry he could perform, his bond is saved although he doth not perform the other, *quia impotentia excusat legem*. And in this case at bar, forasmuch as Jane died before the said Ramsford, so that he could not leave to the said Jane, either as executrix, or by legacy, or other assurance, so much money as should be received by him, etc., and so this part of the disjunctive became impossible by the act of God. See 30 Hen. 6 Barre 60; 15 Hen. 7, 4; 9 Eliz. Dyer 162, between Arundel and Combe. And the case in 21 E. 3, 29, *b*, is not like this case. For there, at the time of the bond made, and at the time when the condition was to be performed, one part of the disjunctive was not possible to be performed, for there, the heir of his body was not *in rerum natura*.

SCULLY *v.* KIRKPATRICK, TO USE, ETC.

IN THE SUPREME COURT OF PENNSYLVANIA, 1875.

[*Reported in* 79 *Pennsylvania State Reports* 324.]

OCTOBER 15th, 1875. Before Agnew, C.J., Sharswood, Williams, Mercur, Paxson, and Woodward, JJ.

Error to the Court of Common Pleas, No. 1, of Allegheny County, of October and November Term, 1875, No. 175.

This was an action of debt brought August 14th, 1873, in the name of John M. Kirkpatrick to the use of Joseph S. Finch and John W. Painter, trading as Joseph S. Finch & Co., against John D. Scully.

The action was on bond, dated May 31st, 1873, executed by Abraham Gumberts, and the defendant, as his surety, in the sum of $10,000, conditioned for the appearance of Gumberts, who had been arrested under the act of July 12th, 1842, etc.

The circumstances of the case are as follows:

On March 3d, 1873, the beneficial plaintiffs filed a petition in the District Court of the United States for the district of Indiana for an adjudication of bankruptcy against Gumberts. The petition set forth the petitioners' demand to be on a promissory note from Gumberts to the petitioners, dated October 5th, 1873, payable in four months, for $5177.58.

The acts of bankruptcy alleged were, that being a merchant he had stopped payment and had not resumed in fourteen days, and that he had sold his goods with intent to defraud his creditors. On March 8th, 1873, Gumberts, in pursuance of an order approved by counsel in the District Court, filed an answer denying the allegations of the petition and asking that the matter might be inquired of by a jury; a trial of the issues was thereupon ordered.

On April 14th, 1873, Finch & Co. brought three suits in the District Court of Allegheny County against Gumberts; one on a draft by them on him, dated January 6th, 1873, payable in ninety days, for $1377.89; another on the note mentioned in the petition in bankruptcy; the third on another draft of January 6th, 1873, payable in sixty days, for $1364.12.

On the same April 14th, Finch & Co. presented a petition to Hon. John M Kirkpatrick, one of the judges of the District Court of Allegheny County, setting out that Gumberts had fraudulently contracted the debt for which the note of $5177.58 had been given, and had obtained the goods for which it had

been given, by false pretences ; and by like fraud and false pretences, etc., had obtained other goods, and that they had brought suits for the note and drafts which were then pending. They prayed for a warrant under the act of July 12th, 1842.

Kirkpatrick, J., accordingly issued a warrant of arrest against Gumberts, and he was brought before the same judge on April 15th.

Further proceedings were had before Kirkpatrick, J. On May 1st Gumberts filed his answer, admitting the purchase of the goods, but denying the fraud and false pretences. He further set out the proceedings in bankruptcy ; also, that being a citizen of the State of Indiana, the plaintiffs commenced a prosecution against him in the Court of Quarter Sessions of Allegheny County for obtaining the goods mentioned by plaintiffs' petition by false pretences and had him brought to Allegheny County to answer that charge, for the purpose of serving civil process upon him within the jurisdiction of the District Court.

Hearing proceeding, and after adjournments from time to time, the docket of the District Court shows the following entries :

" May 31st, 1873, defendant appears, and on his motion, hearing adjourned until June 18th, 1873, at 10 o'clock, A.M., at District Court, room No. 2. Defendant held in $10,000, with surety, for his appearance. Bond approved by the Court."

The condition of the bond was :

" The condition of this obligation is such, that, whereas, the above bounden A. Gumberts was brought before the said John M. Kirkpatrick, judge aforesaid, on a warrant of arrest upon the petition of Joseph S. Finch & Co., under the provisions of the act of July 12th, 1842 ; and, whereas, the hearing was by said judge continued until Wednesday, the 18th day of June, 1873, at District Court, room No. 2, at 10 A.M. Therefore, if the said A. Gumberts do appear at the time and place aforesaid, then this obligation to be void and no effect, otherwise to be and remain in full force and virtue."

Then follow these docket entries :

" June 18th, 1873, plaintiffs appear, defendant not appearing is called and surety called and bond declared forfeited. *Eo die* rule *ex parte* defendant to show cause why the forfeiture should not be taken off."

On June 20th, 1873, Gumberts appeared by his counsel in the District Court of the United States in Indiana, withdrew his answer and consented to be adjudged a bankrupt, and he was thereupon adjudged a bankrupt. The usual proceedings in

bankruptcy followed the adjudication. Finch & Co. were not among the creditors who proved their debts before the register.

On June 30th, 1873, the rule in the District Court of Allegheny County to strike off the forfeiture of the bond was discharged. On the same day Finch & Co. obtained judgment by default against Gumberts in their three suits ; the aggregate amount of the judgments was $8091.47.

On the trial, September 28th, 1874, before Collier, J., the foregoing facts appeared by the evidence of both parties.

The defendant offered to show : " That prior to, and on the 18th day of June, 1873, the time appointed in bond in suit for the appearance of A. Gumberts before the Hon. John M. Kirkpatrick, to answer the warrant of arrest in the bench warrant proceeding—he, the said Gumberts, was ill and unable to appear at the time and place required by the said bond ; that a few days before June 18th, 1873, he had been stricken down by sickness, at his home at Evansville, Indiana, and was thereby prevented appearing in the District Court at Pittsburg on June 18th, 1873 ; to be followed by evidence that so soon as said Gumberts was able to leave home, to wit, on the 30th day of June, 1873, he hastened to Pittsburg, and appeared in the District Court of Allegheny County, before the Hon. John M. Kirkpatrick (the said Joseph S. Finch & Co. and their counsel being then and there present), to answer the complaint of Joseph S. Finch & Co. in the bench warrant proceedings, the 30th of June being the earliest day he was able to appear at Pittsburg after his recovery from his illness ; and that since then said Gumberts died. For the purpose of showing that by the act of God the said Gumberts was unable to appear before Judge Kirkpatrick on June 18th, 1873, and the defendant, Scully, was unable to produce him ; and also for the purpose of showing that there was no breach of condition of the bond in suit."

The plaintiff objected to the offer because : " It appears by the record of the District Court of Allegheny County, already in evidence, that on June 18th, 1873, a decree of forfeiture was entered on the bond in suit ; that same day rule to take off forfeiture was granted defendant, which, after argument on June 30th, 1873, was discharged by the Court. These judgments and decrees of the Court, being a court of competent jurisdiction, cannot be attacked collaterally."

The offer was rejected and a bill of exceptions sealed for the defendants.

The plaintiff's first point, which was affirmed, was :

Under all the evidence in the case, the plaintiff is entitled to recover the amounts due Joseph S. Finch & Co., the equitable

plaintiffs on the judgments in No. 853, 854, and 855, April Term, 1873, already in evidence, with the costs in each.

The defendant's points, which were refused, were :

1. Upon the whole evidence in the case the verdict should be for the defendant.

2. The bench warrant proceedings in the District Court of Allegheny County having been instituted by Joseph S. Finch & Co. subsequently to the institution by them of the proceedings in bankruptcy against said A. Gumberts in the United States District Court for the District of Indiana, the warrant of arrest and all subsequent proceedings, including the bond in suit, were illegal and null and void.

3. The proceedings in the bench warrant case before Hon. John M. Kirkpatrick, never having been determined finally, and the said Gumberts, having appeared therein on June 30th, 1873, the plaintiff is not entitled to recover on said bond.

The jury found for the plaintiff for $10,000, the amount of the bond, to be released on payment of $8721.58, subject to the opinion of the Court on question of law reserved—viz.:

"Whether the District Court of Allegheny County had jurisdiction of the bench warrant proceedings instituted by Joseph S. Finch & Co. against A. Gumberts, after the said Joseph S. Finch & Co. had instituted the proceedings in bankruptcy against said Gumberts in the United States District Court for the District of Indiana, and during the pendency thereof, and whether the bond in suit taken pending the said bankrupt proceedings can be enforced against the said John D. Scully."

The Court, Collier, J., on June 4th, 1875, entered judgment on the verdict for the plaintiff on the reserved question.

The defendant took a writ of error ; he assigned for error :

1. Affirming the plaintiff's point.

2, 3, 7. Refusing the defendant's points.

4. Entering judgment for the plaintiff on the reserved question.

6. Rejecting the defendant's offer of evidence.

M. W. Acheson and *H. W. Weir* for plaintiff in error.

D. T. Watson (*R. B. Carnahan* with him) for defendant in error.

SHARSWOOD, J., delivered the opinion of the Court January 6th, 1876.

In regard to the question presented upon this record on the reserved point in the Court below, as to the validity of the warrant of arrest and the proceedings thereon, under the act of Assembly of July 12th, 1842, entitled "An act to abolish imprisonment for debt, and to punish fraudulent debtors," Pamph.

L. 334, it was fully considered after two arguments and decided adversely to the plaintiff in error, *in re* W. C. Barr, opinion filed November 10th, 1875. It was then held that the State remedies against fraudulent debtors are not suspended by the operation of the Bankrupt Act of Congress, inasmuch as it is expressly declared in that act, that "no debt created by the fraud or embezzlement of the bankrupt or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy," § 5117, Revised Statutes U. S. 993; and also "no bankrupt shall be liable during the pendency of the proceedings in bankruptcy to arrest in any civil action, unless the same is founded on some debt or claim from which his discharge in bankruptcy would not release him." Barber *v.* Rodgers, 21 P. F. Smith, 362, was not the case of a debt fraudulently contracted.

As the first section of the act of 1842 abolishing imprisonment for debt is unconditional, the creditor would be without remedy against a fraudulent debtor, under either the laws of the State or of the United States, unless he could pursue him under that act to compel the application of his acquisitions subsequent to the institution of the proceeding in bankruptcy to the payment of the debt.

The second question which arises relates to the evidence of the breach of the condition of the bond in suit. It appears that the proceedings upon the warrant of arrest issued in the original case by Kirkpatrick, J., were entered upon the docket of the Court, and there is this entry thereon: "June 18th, 1873, plaintiffs appear, defendant not appearing, is called and surety called and bond declared forfeited." This was all the evidence of the breach of the condition. But this entry on the docket did not make a record, unless it was so in point of fact. We are of opinion that it was no part of the record, and the entry therefore not evidence; much less conclusive of the breach of the condition. The proceedings on a warrant of arrest under the act of 1842 are no part of the proceedings in the cause, but merely incidental and collateral thereto. The jurisdiction and authority might just as well have been committed to any other officer as to a judge of the Court in which the suit was commenced or the judgment obtained. The warrant does not issue from the office of the prothonotary, and is not under the seal of the Court. It is issued by the judge himself to the sheriff or any constable, who is nowhere required to make return into the office or to the Court, but who executes the warrant by arresting the defendant and bringing him before the judge issuing the warrant, and keeping him in custody until he is

duly discharged. There is no provision, from one end of the act to the other, that the proceedings or any part of them shall be filed of record. By § 7, "The judge conducting such inquiry shall have the same powers to issue subpœnas to enforce the attendance of witnesses, and to punish witnesses refusing to testify, as is vested in the Court of which he is a judge." The final commitment by § 8 is under the hand of the judge reciting the facts of the case and directing the defendant to be committed to the jail of the county. How, then, could the proceedings be entered on the record, no act from their commencement to their termination being an act of the court? There was no proper evidence before the Court below of the breach of the condition of the bond, and the first point of the defendant below should have been affirmed.

The only other question presented arises upon the sixth assignment of error, the rejection of the offer of evidence by the defendant. The bond in suit was given under the provision of the sixth section of the act of 1842, that "in case of an adjournment the judge may take a bond with or without surety for the appearance of the party arrested at the adjourned hearing." The day named in the condition of the bond for the adjourned hearing was June 18th, 1873. The rejected offer was to prove "that a few days before June 18th, 1873, the defendant, Gumberts, had been stricken down by sickness, at his home at Evansville, Indiana, and was thereby prevented appearing at the day fixed, to be followed by evidence that so soon as said Gumberts was able to leave home, to wit, on the 30th day of June, 1873, he hastened to Pittsburg and appeared before Kirkpatrick, J., to answer the complaint; the 30th of June being the earliest day he was able to appear at Pittsburg after his recovery from his illness." This evidence was objected to as irrelevant, and incompetent because contradicting the record. We have seen that there was no record to contradict, and that in his action in the premises, Kirkpatrick J., was not acting as a court of record, and had no power to adjudge the bond to have been forfeited.

It remains to consider whether the facts presented in the offer were relevant to the issue; in other words, whether they would have constituted a good defence had the breach of the condition been proved, the offer in effect admitting that Gumberts did not appear before Kirkpatrick, J., on June 18th, 1873, the day appointed for the adjourned hearing.

It is undoubted law that if the condition of a bond becomes impossible to be performed by the act of God, the obligation is discharged. Co. Litt. 206*a*. But a condition was then only

considered in the eye of the law as impossible if it could not by any means take effect. Co. Litt. 206*a*; Butler's note 98. Death of the party who is to perform the condition of course releases the bond, but that it could only be done with great danger to the life of the party is not sufficient. Some hard examples are to be found in cases of special bail, but there is a peculiarity in the alternative condition of the recognizance of special bail which is to be remembered in reading these cases. Wynn *v.* Petty, 4 East, 102; Grant *v.* Fagan, 4 East, 189; Bowerback *v.* Payne, 2 Wash. C. C. Rep. 464; Rathbone *v.* Warren, 4 Johns. 310; Olcott *v.* Lilly, 4 Johns. 407. Some relaxation of the rigidity of the rule occasionally appears. Thomas *v.* Buckley, 5 Cowen, 25; Boardman *v.* Fowler, 1 Johns. Cas. 41. The power of a Court in giving relief against their own orders, though of the most final and absolute kind, is illustrated in Doty *v.* Whittlesey, 1 Root, 310. There a party on his way to pay money for the redemption of a mortgage under a final and absolute decree of foreclosure at a day certain, was taken sick and could not proceed; the Court extended the time. See also Crane *v.* Hanks, 1 Root, 468.

It is said, indeed, that in matters of positive contract and obligation created by the party (for it is different in obligations or duties created by law) it is no ground for the interference of equity, that the party has been prevented from fulfilling them by accident; or that he had been in no default. The reason is that he might have provided for such contingencies by his contract if he had so chosen. 1 Story's Eq. Jur., § 101.

This reason, however, would not apply to the case before us, for this was a statutory bond and could only be given in the form prescribed, as was held by this Court in McClelland *v.* Smith, 2 Jones, 303.

The principle so broadly stated is not supported by the later cases. Equity will often in the case of positive contract give relief, not perhaps on the ground of accident, but by an equitable interpretation of the terms of the contract. They will imply that the parties necessarily intended an exception. Pollard *v.* Shaaffer, 1 Dall. 210, an early case in this State was of that character. The later English cases very distinctly recognize this equitable doctrine. In Hall *v.* Wright, El. B. & E. 746, Crompton, J., said: "When a contract depends upon personal skill, and the act of God renders it impossible, as for instance in the case of a painter employed to paint a picture, who is struck blind, it may be that the performance might be excused." And see Taylor *v.* Caldwell, 3 Best & Smith, 826.

In Boast *v.* Firth, Law Rep. 4 C. B. 1, to an action for breach

of an apprenticeship deed, the defendant (the father) pleaded that the apprentice "was and is prevented by the act of God, to wit, by permanent illness, happening and arising after the making of the indenture, from remaining with or serving the plaintiff during all the said term;" it was held on demurrer a good plea or excuse of performance. There are several American cases which sustain the position that when the act to be performed is of a purely personal character, which can only be done by the party himself, the act of God in producing sickness and insanity, as well as death, will be an excuse for performance. Dickey *v.* Linecott, 7 Shepley, 353; Knight *v.* Bean, 9 Shepley, 536; Fenton *v.* Clark, 11 Verm. 360; Hubbard *v.* Belwin, 1 Williams, 645; Fuller *v.* Brown, 11 Metc. 440; Fraley *v.* North, 19 Barb. 342; Wolfe *v.* Howe, 24 Barb. 174; Jarroll *v.* Farris, 6 Missouri, 159. And there is a decision by the Supreme Court in New York which applies the principle to a case precisely the same as that before us, and is therefore directly in point. In an action of debt on a recognizance conditioned that the sheriff arrested on an attachment should appear on a day named to answer for a contempt, the defendant, the surety in the recognizance, pleaded that the sheriff before the day was taken violently sick and could not be removed; after the day he died. On demurrer the plea was held to be sufficient. The People *v.* Manning, 8 Cowen, 297.

And is it not a most reasonable and just doctrine? Had Gumberts died on June 17th, 1873, the bond would have been discharged and the surety released. Would it not shock our sense of common justice in a court where equity is part of the law, to be told that if he was dying on that day, but did not expire until June 19th, we must hold his surety bound? The impossibility of personal appearance would have been the same in both cases. If he had become a raving maniac, must he be brought before the judge in a strait-jacket? In either case his presence would have answered no purpose of the inquiry. He could have replied to no questions. Had he, however, put in no appearance before his death, there would have been some force in the contention that the plaintiff had lost all the benefit of his proceeding, and the surety must bear the consequences, that the plaintiff had the law on his side and equal equity, and there ought therefore to be no interposition in behalf of the surety. But the offer here was to show that Gumberts did appear as soon as he was able, and the plaintiff might have had all the advantage of the proceeding. If then his excuse for not appearing at the day named was a valid one in equity, his appearance at the subsequent term as soon as he was able saved

the bond, and the error of the judge in not continuing the proceeding ought not to prejudice his surety.

Judgment reversed, and *venire facias de novo* awarded.

WHITNEY *v.* SPENCER AND GRANT, IMPLEADED WITH HERRICK.

IN THE SUPREME COURT OF NEW YORK, FEBRUARY, 1825.

[*Reported in* 4 *Cowen* 39.]

ON error from the Common Pleas of Delaware. In that court the plaintiff declared against the defendants in debt, for $100, upon a bond dated July 27th, 1818, with condition, after reciting that a judgment had, on the day of the date, been rendered in favor of the plaintiff, against one Stockton, for $50, with costs, that if Stockton should well and truly pay the judgment at the expiration of three months from the date of the bond, or surrender Stockton's body in execution within thirty days thereafter, then the bond to be void, etc. The declaration then averred that Stockton did not pay the judgment at the expiration of the three months, nor at any time afterward, nor did he, within thirty days thereafter, surrender his body in execution, agreeably to the condition of the bond. The defendant pleaded, first, that no execution issued on the judgment at any time before the commencement of the plaintiff's suit; second, that Stockton was ready within the county of Delaware, to be surrendered by the defendants whenever execution should be issued against him.

General demurrer to both pleas and joinders, upon which the Court below gave judgment for the defendants.

L. Monson for the plaintiff in error.

S. Sherwood, contra.

CURIA. We think differently. In Mounsey *v.* Drake, the condition was general to surrender to the sheriff. Here it is to surrender in execution. No one could sue out this execution except the plaintiff. It was, therefore, his own fault that the surrender did not take place.

Judgment affirmed.

BARKER *v.* HODGSON.

In the King's Bench, November 22, 1814.

[*Reported in* 3 *Maule & Selwyn* 267.]

Covenant ; the plaintiff declares on a charterparty of affreightment made between him as master of the brig Providence, and the defendant, as freighter, upon a voyage to Gibraltar, there to deliver the outward cargo, and having so delivered to take on board from the agents or assigns of the freighter at Gibraltar and Cadiz, both or either, or at Gibraltar and Malaga, both or either, as should be ordered by the freighter or his agents, a homeward cargo, and deliver the same at London, etc., for which 60 running days were allowed, and that the defendant covenanted that he, his agents or assigns at Gibraltar and Cadiz, both or either, or at Gibraltar and Malaga, both or either, should and would, at his or their own costs and charges, send the said homeward cargo alongside the ship, and assigns a breach in the terms of that covenant ; *per quod* the plaintiff was prevented from taking on board the said homeward cargo, and obliged to return home without any cargo.

Pleas : First, that after delivery of the outward cargo at Gibraltar, and before the expiration of the 60 running days, a certain pestilent and malignant disorder broke out and prevailed there, and thereupon all such public intercourse and communication as was necessary for the purpose of sending the homeward cargo alongside the ship, became and was, and until the discharge of the plaintiff as thereinafter mentioned continued to be, unlawful and prohibited by the then public and established law of the place, until further regulations, so that the defendant or his agents could not send the same alongside, without violating such law ; whereof the plaintiff had notice, and was then and there discharged by the agent of the defendant from the further performance of his contract. Secondly, that after the delivery of the outward cargo as aforesaid, and before the expiration of the 60 running days, a certain pestilent, malignant and infectious disorder broke out and prevailed at Gibraltar, and thereupon all such public intercourse and communication as was necessary for the purpose of sending the homeward cargo alongside, became and was, and until the discharge of the plaintiff as thereinafter mentioned continued to be, impracticable, without great and imminent danger, to the persons concerned therein, of contracting, or communicating the said disorder, and the defendant and his agents were

then and there prevented, during all that time, from so sending the said cargo; of which the plaintiff had notice, and was then and there discharged, etc., as before. And there were two other pleas respectively similar to the two above stated, except that instead of alleging that "all public intercourse, etc., became and was, and until the discharge of the plaintiff continued to be, unlawful, etc., and impracticable," etc., they alleged that "all public intercourse, etc., became and was, and until and at the departure of the plaintiff as thereinafter mentioned continued to be, unlawful, etc., and impracticable," etc.; and instead of concluding that "the plaintiff had notice thereof, and was then and there discharged," etc., they concluded that "the plaintiff had notice thereof, and thereupon departed with his ship on her return to London."

Replications to the two first pleas stated in substance, "that before the breaking out of the said disorder, etc., the ship had delivered her outward cargo, and stayed a long time, to wit, ten days, for the purpose of receiving the homeward cargo; and that before all communication became unlawful, or was impracticable, the defendant could, and might, and ought to have sent the homeward cargo alongside, etc., but the defendant did not nor would during that time, nor at any time afterward, send the same alongside (although often requested) but wholly refused;" and the replications to the two last pleas added, "and thereupon the plaintiff by and with the license and consent of the defendant's agent departed," etc. And upon demurrer, and joinder, the doubt was, if the matter alleged in the pleas was sufficient to excuse the defendant for the non-performance of his covenant.

Littledale contended that the matter was sufficient, and especially upon the two latter pleas, which were not pleaded in discharge of the covenant, but only as a suspension of it; and he compared it to the case in 1 Roll. Abr. 450, pl. 10. "If a man covenant to build a house before such a day, and afterward the plague is there before the day, and continues there till after the day, this shall excuse him from the breach of the covenant for not doing thereof before the day, for the law will not compel him to venture his life for it, but he may do it after." So here, the covenant was suspended, and the defendant excused from sending the cargo alongside during the time of the pestilence, and if the plaintiff thereupon departed with his ship by the consent of the defendant, he cannot complain that the defendant did not afterward send it. Then if the defendant is excused from performing the principal thing, he shall also be from the consequences of not doing it.

Lord ELLENBOROUGH, C.J. Perhaps it is too much to say that the freighter was compellable to load his cargo ; but if he was unable to do the thing, is he not answerable for it upon his covenant ? Is not the freighter the adventurer, who chalks out the voyage, and is to furnish at all events the subject-matter out of which freight is to accrue ? The question here is, on which side the burden is to fall. If indeed the performance of this covenant had been rendered unlawful by the government of this country, the contract would have been dissolved on both sides, and this defendant, inasmuch as he had been thus compelled to abandon his contract, would have been excused for the non-performance of it, and not liable to damages. But if in consequence of events which happen at a foreign port, the freighter is prevented from furnishing a loading there, which he has contracted to furnish, the contract is neither dissolved, nor is he excused for not performing it, but must answer in damages.

PER QURIAM.

Judgment for the plaintiff.

Scarlett was to have argued on the other side.

THE MARQUIS OF BUTE *v.* THOMPSON AND ANOTHER.

IN THE EXCHEQUER, NOVEMBER 25, 1844.

[*Reported in* 13 *Meeson & Welsby* 487.]

COVENANT. The declaration stated, that by an indenture dated March 24th, 1842, made between the plaintiff, of the one part, and the defendants, of the other part, reciting that, by an agreement of April 23d, 1824, one Edward Davis agreed to let to the plaintiff all his right and interest in the coals and other minerals (ironstone excepted), in the Pwllywheale estate, in the parish of Merthyr, in the county of Glamorgan, in as ample a manner as the same were demised to Davis ; it was witnessed, that the plaintiff thereby demised and let to the defendants all his right and interest in the coals and other minerals in, upon, and under the said estate, in as ample a manner as the same were demised to him, the plaintiff, by Davis, from March 25th, 1827, for the term of fifty years wanting ten days, yielding and paying yearly, for every ton of coal that should be worked, raised, or got by the defendants in each year, not exceeding in the whole 13,000 tons in any one year, the sum of 8*d.* per ton, or yielding or paying that amount of money, namely, the sum

of £433 6*s*. 8*d*., each year, as fixed rent, whether the coal should be worked or not; such royalty or rent to be paid and payable by four equal quarterly payments; that is to say, upon, etc., that the defendants covenanted that they would raise and work 13,000 tons of coals in each year during the said term, and pay at the rate of 8*d*. per ton royalty for the same, or pay that amount of money, namely, £433 6*s*. 8*d*., each year, as fixed rent, whether the coals should be wrought or not, and also 9*d*. for each ton over and above that quantity, to whatsoever extent the same might be wrought. Breach, that the defendants had not raised or worked 13,000 tons of coal in each year during the said term, and paid at the rate of 8*d*. per ton for the same, or paid that amount of money, namely, £433 6*s*. 8*d*. each year, as fixed rent, whether the coals were wrought or not, but on the contrary thereof, to wit, on, etc., a large sum of money, to wit, £216 13*s*. 4*d*. of the said rent, for one half year of the said term, became, and was, and still is in arrear and unpaid to the plaintiff.

The defendants, in their plea, craved oyer of the indenture of lease, and set it out in full. The reddendum was as follows: "Yielding and paying yearly and every year during the said term, unto the said Marquis of Bute, his executors, etc., for every ton of coal that shall be worked, raised, or got by the said W. Thompson and T. S. Forman, their executors, etc., in each and every year, not exceeding in the whole 13,000 tons in any one year, the sum of 8*d*. per ton; or yielding and paying that amount of money, namely, the sum of £433 6*s*. 8*d*., in each year, as fixed rent, whether the coals shall be worked or not, such royalty or rent to be paid and payable by four equal quarterly payments, etc.; and further, yielding and paying yearly and every year during the said term hereby granted, unto the said Marquis of Bute, etc., for every ton of coals that shall be worked, raised, or got by the said W. Thompson and T. S. Forman, in each and every year, over and above the quantity of 13,000 tons, the sum of 9*d*. per ton; and also yielding and paying yearly unto the said Marquis of Bute, for every ton of stones, sand, and fireclay hereby demised, which shall be worked, raised, and actually used, and not otherwise, from or under the said farm and lands, such price as the said Marquis shall for the time being charge and receive for every ton of stones, sand, or fireclay belonging to him, the said Marquis, and let by him, or permitted to be got out of any of his land within the parish of Merthyr aforesaid, or the neighborhood."

Then followed a covenant by the defendants, that they would raise and work 13,000 tons of coals in each year, and pay at

the rate of 8*d.* per ton royalty for the same, or pay that amount of money, namely, £433 6*s.* 8*d.*, each year, as fixed rent, whether the coals should be wrought or not, and also 9*d.* for each ton over and above that quantity, to whatever extent the same might be wrought ; and also pay to the said Marquis, his executors, etc., for every ton of stones, sand, and fireclay which should, by virtue of those presents, be raised, worked, and used by the said defendants, etc. The defendants then pleaded, as to the alleged breach of covenant in the declaration relating to the non-payment of half a year's rent, that in and by the fair and proper working, etc., of the said coal, the same became and was, before and at the commencement of the said half year, greatly exhausted, and that before and at the commencement of the said half year, a small and inconsiderable portion thereof only, the same being less than one-fourth part of such 13,000 tons, and no more, was left and remained to be worked, etc., under and by virtue of the said indenture ; and that the defendants have always worked, raised, and got the said coal with due care, diligence, and despatch, and still continue to do so with all possible and practicable care and despatch. Verification.

Demurrer and joinder. The point marked for argument on the part of the plaintiff was, that the covenant was an absolute covenant to pay the money rent, and not a conditional covenant.

The case was argued in the last Trinity Term (May 29th) by

Erle for the plaintiff.

Kelly for the defendants.

On July 6th last, the Court intimated that their judgment was in favor of the plaintiff ; and now

Pollock, C.B., said : This case was decided some time ago. We have been asked for the reasons of our judgment, which was that the plaintiff was entitled to recover. The foundation of the opinion of the Court is extremely short. This is an action of covenant : the defendants have expressly covenanted that they, their executors, administrators, and assigns, or some or one of them, should and would raise and work 13,000 tons of coal in each and every year during the term, and pay at the rate of 8*d.* per ton royalty for the same, or pay in money annually, £433 6*s.* 8*d.* each year, as fixed rent, whether coals should be wrought or not, and also 9*d.* upon each ton over and above that quantity, to whatever extent the same might be wrought. We are of opinion that this stipulation for a fixed rent, coupled with a covenant that coal should be wrought to that extent, and if above it, that there should be a payment of 9*d.* for each ton over and above, does not carry with it, by any implication, a condition that there shall be coals to that

amount capable of being wrought. It appears to us to be a stipulation on the part of the defendants that they would work and get that quantity, and that if they did not get it, they would pay a fixed rent to the landlord ; and we cannot import into that covenant a condition that there should be coals to that extent. If that was the intention of the parties, they should so have expressed it. This is the short ground on which we are of opinion that the plaintiff, the Marquis of Bute, is entitled to the judgment of the Court.

Judgment for the plaintiff.

HILLS AND ANOTHER *v.* SUGHRUE.

IN THE EXCHEQUER, FEBRUARY 13, 1846.

[*Reported in* 15 *Meeson & Welsby* 252.]

ASSUMPSIT. The declaration stated, that, on September 21st, 1844, by a certain memorandum in writing then made by and between the defendant, therein described as owner of the ship called the Seppings, etc., and the plaintiffs, the plaintiffs and the defendant then agreed that the said ship should proceed direct to Ichaboe, one of the Guano islands, on the west coast of Africa, and there load a full and complete cargo of guano, free from dirt and rubbish, and in as dry a state as practicable, by the ship's boats and tackle, and by the labor of the crew, etc.; and being so loaded, should therewith proceed to Cork or Falmouth for orders, which were to be in waiting at both ports, whether to discharge there or at a safe port in the United Kingdom, and deliver the same, on being paid freight at the rate of £4 15*s.* sterling per ton ; and which freight the plaintiffs thereby bound themselves to pay for every ton of guano so delivered at the port of discharge, restraint of princes and rulers, the acts of God, and the queen's enemies, fire, and all and every the dangers and accidents of the seas, etc., always excepted ; the freight to be paid, one third on arrival at the port of discharge, and the balance by one approved bill on London at three months' date, or in cash, under discount, at the plaintiffs' option. Twenty-one working days were to be allowed the plaintiffs, if the ship was not sooner discharged at the port of unloading, and ten days on demurrage, over and above the said laying days at £7 per day. The plaintiffs to ship bags and other materials requisite for loading the ship ; the vessel, upon her return, if in London, to be addressed to

Messrs. Cramond & Schuyler. The cargo to be taken from alongside the vessel at the expense and risk of the plaintiffs, and the plaintiffs to supply the stores for the said vessel, at cash prices, for the voyage, and deduct the amount from the balance of freight; but, in the event of the vessel being lost, or any other unforeseen cause preventing the completion of this charterparty, the defendant thereby agreed to pay the plaintiffs the amount of the disbursements for the stores supplied by him to the ship. The declaration set forth other stipulations of the charterparty, not material to this report; it then alleged mutual promises, and averred that the plaintiffs shipped on board the vessel the bags and other materials requisite for loading the ship, and supplied the necessary stores; and that, although the defendant was not prevented by restraint of princes, etc., from fulfilling the agreement on his part, and although, within a reasonable time, the plaintiffs' said orders, directed to the captain at Cork and Falmouth, which were in waiting at both ports at the arrival of the ship at Falmouth, and thereby directed that the ship should proceed to London to discharge her cargo, and although the plaintiffs were always ready and willing to take such cargo from alongside the vessel at their own expense and risk, and to pay freight for the same according to the said indenture, etc., of which proceeding the defendant had notice; and, although the said ship did, to wit, on, etc., proceed direct to Ichaboe aforesaid, and arrived there, to wit, on, etc., and although a reasonable time for her to load the cargo in the said memorandum mentioned at Ichaboe aforesaid, and to proceed therewith to Cork or Falmouth, and thence to London, elapsed before the commencement of this suit; yet the defendant has disregarded the said memorandum and his promise, in this, to wit, that the said ship did not, at Ichaboe aforesaid, load a full and complete cargo of guano, free from dirt and rubbish, etc., by the ship's boats and tackle, and by the labor of the crew, but, on the contrary thereof, loaded a very small quantity, to wit, twenty tons of guano, and no more, and the same was full of dirt and rubbish, etc.

The defendant pleaded, that, the plaintiffs having supplied the stores for the said vessel at cash prices, amounting to the sum of £183 15*s.* for the said voyage, the said ship did, after the making of the said memorandum or charterparty, to wit, on, etc., proceed direct to Ichaboe aforesaid, and arrived there, to wit, on, etc.; and that, upon and after the arrival of the said ship at Ichaboe aforesaid, certain, to wit, the said unforeseen causes preventing the completion of the said memorandum

or charterparty, mentioned and provided therein, arose ; that is to say, the unforeseen causes as hereinafter mentioned, which then and there, and afterward, wholly prevented the completion of the said memorandum or charterparty : and the defendant in fact says, that upon and after the arrival of the ship at Ichaboe aforesaid, and within a reasonable time and with all reasonable despatch after the arrival of the said ship at Ichaboe aforesaid, the master and crew of the said ship, to wit, Charles Grant, then being the master of the said ship, and one William Hall, being then chief mate of the same, and eight other persons of the crew of the said ship, landed at Ichaboe aforesaid, with the ship's boats and tackle, for the purpose of procuring the said guano in the said memorandum or charterparty mentioned, free from dirt and rubbish, and in as dry a state as practicable, wherewith to load a full and complete cargo in and on board the said ship, in fulfilment of the terms and conditions of the said memorandum or charterparty ; yet the said defendant avers, that there was not, at the time the said persons so landed on the said island for the purpose aforesaid, nor within a reasonable time thereafter, any guano as in the said memorandum or charterparty specified, free from dirt and rubbish, to be had, procured or obtained, wherewith to load a full and complete cargo, or any part thereof, for the said ship, or to be had or procured in or upon the said island : whereupon, and by reason of such unforeseen cause as aforesaid preventing the completion of the said memorandum or charterparty, the said ship afterward, to wit, on September 17th, 1845, necessarily and unavoidably returned from Ichaboe aforesaid, without a full and complete cargo of guano, free from dirt and rubbish, as in the said memorandum specified, or any part thereof : and thereupon afterward, and after the return of the said ship from Ichaboe aforesaid to England (the plaintiffs and defendant then having notice of the premises aforesaid), the defendant, to wit, on, etc., pursuant to the terms and conditions of the said memorandum or charterparty, paid to the plaintiffs the said amount of the said disbursements in the said memorandum or charterparty provided, and in the said first count mentioned, for the stores so supplied by them to the said ship, as in the first count of the declaration mentioned, the same amounting to the said large sum of money, to wit, to the sum of £183 15*s*., according to the terms and conditions of the said memorandum or charterparty : Wherefore the defendant saith, that the plaintiffs ought not to have or maintain their aforesaid action thereof against the defendant ; and this the defendant is ready to verify, etc.

Special demurrer, assigning for causes (*inter alia*), that the plea improperly assumes that the stipulation in the said memorandum contained, providing for the event of the said vessel being lost, or any other unforeseen causes preventing completion, imports that the defendant was not to be liable for the breach of the said contract to load, proceed with, discharge, and deliver, as therein mentioned, such cargo of guano as aforesaid, in the event of any unforeseen causes preventing the defendant from performing such contract; whereas the said stipulation imports no more than that, in the event thereby provided for, the defendant was to pay to the plaintiffs the amount of their disbursements for stores supplied by them to the ship for the voyage; and that, though the plea does not deny in any way either the contract or the breach of contract above alleged, or the averment in the declaration that the defendant was not prevented from performance by restraint of princes, etc., yet the defendant attempts to deny his liability for such breach; and further, that the inability of the defendant, by reason of the matters in the plea mentioned, to perform his contract, affords no defence in law to the plaintiffs' claim for damages for the non-performance of it, etc.

Joinder in demurrer.

J. Henderson in support of the demurrer.

Hoggins, contra.

PARKE, B. I think this plea is bad in substance. The question arises entirely on the construction of this charterparty. The first part of it provides, that the ship, of which the defendant is the owner, shall proceed direct to Ichaboe, and there load a full and complete cargo of guano, free from dirt and rubbish, etc., by the ship's boats and tackle, and the labor of the crew, and, being so loaded, shall proceed direct to Cork or Falmouth, etc. Then follows a provision that the plaintiffs shall ship bags and other materials requisite for loading the ship, and shall supply the stores for the vessel, at cash prices, for the voyage, and deduct the amount from the balance of freight; and then a clause discharging the charterer from liability in the event of the vessel being lost, or of any other unforeseen causes preventing the completion of the charterparty; but there is no provision for his discharge in the case of inability to find a cargo of guano; and in the clause providing for the lay-days, there is no mention of days for loading the cargo. If the instrument stopped here, there could be no doubt that this is an absolute stipulation to provide a full cargo of guano, and however he may be prevented from doing so, that the defendant would be bound by that stipulation. He is

to receive freight at a high rate, and it looks very much like a contract for supplying guano at that price. But then Hoggins contends, that, inasmuch as it is provided, that in the event of any unforeseen cause preventing the completion of the charter-party, the defendant is to pay the plaintiffs the amount of the disbursements for the stores supplied by them to the ship, and as it could not be foreseen that guano would not be found at Ichaboe in sufficient quantity to load, he is, in such an event, discharged from liability on repayment of the amount of such disbursements; but, on fully considering that clause, from which alone any doubt could arise, it seems to me that none really exists. The stipulation of the plaintiffs is in reality nothing more than a stipulation to pay the amount of the necessary disbursements for stores for the voyage, in advance of the freight; then, if the ship be lost, or any other unforeseen cause arise to occasion a loss of the freight, the charterer is to be repaid that advance. If the parties meant to refer to any unforeseen cause which might prevent the loading of a cargo, they would have said so; but they have not; they have only said, that if the plaintiff do not repay himself his advances from the freight, the defendant shall repay it. But if the defendant do not perform his positive contract, by loading a cargo, he is to be answerable in damages, to be measured, of course, by the market price of the guano; if it rises, the damages will be substantial; if it falls below the freight, they will be nominal. It is a positive obligation to procure and load a cargo; and the case resembles that of The Marquis of Bute *v.* Thompson, 13 M. & W. 487, where there was an absolute covenant, by a lessee, to raise a certain quantity of coals in each year, and it was held to be no answer that no coals were to be got. Our judgment will therefore be for the plaintiffs.

Judgment for the plaintiff.[1]

BROWN and Others *v.* THE ROYAL INSURANCE COMPANY.

In the Queen's Bench, May 3, 1859.

[*Reported in* 1 *Ellis & Ellis* 853.]

The first count of the declaration set out a policy of insurance effected by the plaintiff with the defendants, insuring from fire, for one year, to the amount of £1500 certain premises in the occupation of the plaintiff Brown, subject to certain con-

[1] The concurring opinions of Barons Rolfe and Platt have been omitted. —Ed.

ditions endorsed on the policy and set out in the declaration. The twelfth condition (the only one material to the present case) was as follows : " Persons insured by this company, and who may suffer loss, will receive their indemnity without deduction or discount ; but in every case of loss, the company will reserve to itself the right of reinstatement in preference to the payment of claims, if it shall judge the former course to be most expedient." Averment, " that after the making of the said policy, and before this suit, the said insured premises were partly burnt down and consumed and destroyed by fire, and the residue of the said insured premises were damaged by fire, and thereby rendered unsafe and dangerous, and by reason thereof the same were obliged to be, and were, pulled down, by which said burning down, consuming, and destruction by such fire as aforesaid, and damaging and pulling down of the said insured premises, the plaintiffs sustained damage and loss to a large amount, to wit, to the full amount of £1500 so insured on the said premises by the said policy as aforesaid. And the plaintiffs further say that, before and at the commencement of this suit, all conditions precedent had been performed, and all things existed necessary, and all times had elapsed necessary, to entitle the plaintiffs to be paid by the said company the said amount of their said damage and loss, or to have the said premises reinstated by the said company. Yet the said company have not paid the said amount of the said damage and loss of the plaintiffs, nor has the said company reinstated the said premises, and such damage and loss has not, nor has any part thereof, been made good to the plaintiffs." The second count, after stating the execution of the policy, " as in the first count mentioned, with the same conditions as therein mentioned," and the damage by fire to the premises, as stated in the first count, proceeded as follows : " And the plaintiffs say that the said company thereupon, having notice of the premises, elected to reinstate the said insured premises under the said policy in preference to the payment of the plaintiffs' claim for the loss and damage aforesaid, and gave notice of such election to the plaintiffs ; and the said company thereupon began and proceeded to reinstate and restore the said insured premises, yet the said company did not complete or finish the reinstatement of the said premises, or proceed with due care, skill, despatch, or diligence in such reinstatement, although a reasonable time for such purposes long since elapsed, but therein failed and made default ; and by reason thereof the remains of the said premises, not so destroyed by fire as aforesaid, afterward settled, sank, cracked, and gave way, and became danger-

ous and ruinous, and were thereby afterward obliged to be, and were, taken and pulled down, and have never been reinstated by the defendants, and thereby also the plaintiff James Brown was put to great expense in and about certain proceedings taken by the Commissioners of Sewers of London for the pulling down of the said premises, and was for a long time deprived of the use and occupation of the said premises, of which he was the tenant at the time of the said fire and damage, and was hindered from carrying on his trade," etc.

Second plea. "As to so much of the first count as alleges that the said insured premises were partly burned down and consumed and destroyed by fire, and the residue of the said premises were damaged by fire, whereby the plaintiffs sustained loss and damage, the defendants say that, within a reasonable time after the happening of the loss and damage in the introductory part of this plea mentioned, the defendants, in pursuance of the said condition, on the said policy endorsed, judged it expedient and elected to reinstate the said insured premises in preference to the payment of the plaintiffs' claim for the said loss and damage, of which the plaintiffs then had notice. And the defendants further say that, within a reasonable time after the happening of the said loss and damage, they proceeded to reinstate the said insured premises as aforesaid, and did proceed and were proceeding, with all reasonable despatch, in the reinstatement of the same as aforesaid, until the Commissioners of Sewers of the city of London, duly acting under the authority and in pursuance of the provisions of the Metropolitan Building Act, 1855, and having jurisdiction in that behalf, caused the said insured premises to be taken down as a structure in a dangerous condition, whereby the defendants were prevented from further proceeding with or completing the reinstatement of the said insured premises as aforesaid. And the defendants further say that the dangerous condition of the said insured premises at the time of their being so caused to be taken down, and for which they were so caused to be taken down as aforesaid, was not caused by the burning down, consuming, destruction, or damaging by fire, of the said insured premises in the said first count mentioned respectively; and that, if the said Commissioners had not caused the said premises to be taken down as aforesaid, the defendants might, could, and would have reinstated the said premises in, and restored them to, the same State and condition as they were in before and at the time of the happening of the said loss and damage by fire."

Third plea, as to the second count: "That, after the hap-

pening of the loss and damage by fire, in that count mentioned," the defendants "did proceed and were proceeding, with due care, skill, despatch, and diligence in the said reinstatement of the said insured premises, until the Commissioners of Sewers of the city of London, duly acting under the authority and in pursuance of the provisions of the Metropolitan Building Act, 1855, and having jurisdiction in that behalf, caused the said insured premises to be taken down as a structure in a dangerous condition, and which is the taking and pulling down in the said second count mentioned; whereby the defendants were prevented from further proceeding with or completing or finishing the reinstatement of the said insured premises." The plea then proceeded in the same form as the second plea.

Demurrer to both pleas. Joinder in demurrer.

Joseph Brown for the plaintiffs.

Lush for the defendants.

LORD CAMPBELL, C.J. I am of opinion that our judgment ought to be for the plaintiffs. The case stands as if the policy had been simply to reinstate the premises in case of fire; because, where a contract provides for an election, the party making the election is in the same position as if he had originally contracted to do the act which he has elected to do. The premises, then, having suffered this damage by fire, and the defendants not having reinstated them, do these pleas furnish a defence to an action for not reinstating? I am of opinion that they do not. The defendants undertook to do what was lawful at the time, and has continued to be lawful. That being so, the fact that performance has become impossible is no legal excuse for their not performing it, and they are liable in damages. That is the doctrine to be deduced from a class of cases to which I referred in my judgment in Hall *v.* Wright, E. B. & E. 746, 758 (E. C. L. R. Vol. XCVI.). If any one undertakes to do a particular lawful act, and does not do it, it is no excuse that he cannot do it, if the law has not since rendered it unlawful. There was nothing unlawful in this contract; and, if it is impossible for the defendants to perform it, they must pay for that impossibility.

ERLE, J. I cannot concur in the judgment which has been just given. If it be correct, it seems to me to follow, as a consequence, that the plaintiffs could claim damages unless the defendants entirely rebuilt the premises. The contract must (the election having been made) be considered as a contract to reinstate the premises in their original condition. The defendants were willing to do so; but before they could do so, the Commissioners prohibited them, so that the performance of the

contract became impossible. The defence raised by the pleas seems to be either that, or, else, that the non-performance of the contract by the defendants arose from the fault of the plaintiffs themselves in allowing their premises to get into such a dangerous state that the Commissioners ordered them to be pulled down. I think the defence is good either way. If not, the plaintiffs would have a right to an entire new house, which was not stipulated for by the contract.

CROMPTON, J. We have nothing to do with the mode in which the damages are to be assessed. I think the pleas are no answer to the action. There was not, and is not, anything illegal in what the defendants must now be considered as having contracted to do, and therefore the maxim given in Co. Litt. 146*a* applies, "*Quod semel placuit in electionibus amplius displicere non potest.*" The defendants are bound by their election; and, if the performance has become impossible, or (which is all they have shown) more expensive than they had anticipated, still they must either perform their contract or pay damages for not performing it.

HILL, J. I also am of opinion that the pleas are no answer. If we held that they were, the consequence would be that the defendants, although they themselves admit that they are bound to do something, would not be liable to do anything under their contract. The maxim given in Co. Litt. 146*a*, and cited by my Brother Crompton, applies here. I do not see that the performance of the contract has become impossible; it has become more expensive, no doubt, but that is no answer.

Judgment for the plaintiffs.

TAYLOR AND ANOTHER *v.* CALDWELL AND ANOTHER.

IN THE QUEEN'S BENCH, MAY 6, 1863.

[*Reported in* 3 *Best & Smith* 826.]

THE declaration alleged that by an agreement, bearing date May 27th, 1861, the defendants agreed to let, and the plaintiffs agreed to take, on the terms therein stated, the Surrey Gardens and Music Hall, Newington, Surrey, for the following days—that is to say, Monday, June 17th, 1861, Monday, July 15th, 1861, Monday, August 5th, 1861, and Monday, August 19th, 1861, for the purpose of giving a series of four grand concerts and day and night *fêtes*, at the Gardens and Hall on those days

respectively, at the rent or sum of £100 for each of those days. It then averred the fulfilment of conditions, etc., on the part of the plaintiffs ; and breach by the defendants, that they did not nor would allow the plaintiffs to have the use of the Surrey Music Hall and Gardens according to the agreement, but wholly made default therein, etc.; whereby the plaintiffs lost divers moneys paid by them for printing advertisements of and in advertising the concerts, and also lost divers sums expended and expenses incurred by them in preparing for the concerts and otherwise in relation thereto, and on the faith of the performance by the defendants of the agreement on their part, and had been otherwise injured, etc.

Pleas. First. Traverse of the agreement.

Second. That the defendants did allow the plaintiffs to have the use of the Surrey Music Hall and Gardens according to the agreement, and did not make any default therein, etc.

Third. That the plaintiffs were not ready or willing to take the Surrey Music Hall and Gardens.

Fourth. Exoneration before breach.

Fifth. That at the time of the agreement there was a general custom of the trade and business of the plaintiffs and the defendants, with respect to which the agreement was made, known to the plaintiffs and the defendants, and with reference to which they agreed, and which was part of the agreement, that in the event of the Gardens and Music Hall being destroyed or so far damaged by accidental fire as to prevent the entertainments being given according to the intent of the agreement, between the time of making the agreement and the time appointed for the performance of the same, the agreement should be rescinded and at an end ; and that the Gardens and Music Hall were destroyed and so far damaged by accidental fire as to prevent the entertainments, or any of them being given, according to the intent of the agreement, between the time of making the agreement and the first of the times appointed for the performance of the same, and continued so destroyed and damaged until after the times appointed for the performance of the agreement had elapsed, without the default of the defendants or either of them.

Issue on all the pleas.

On the trial, before Blackburn, J., at the London Sittings after Michaelmas Term, 1861, it appeared that the action was brought on the following agreement :

"ROYAL SURREY GARDENS,

"27th May, 1861.

"Agreement between Messrs. Caldwell & Bishop, of the one

part, and Messrs. Taylor & Lewis of the other part, whereby the said Caldwell & Bishop agree to let, and the said Taylor & Lewis agree to take, on the terms hereinafter stated, the Surrey Gardens and Music Hall, Newington, Surrey, for the following days—viz.:

"Monday, the 17th June, 1861,
" " 15th July, 1861,
" " 5th August, 1861,
" " 19th August, 1861,

for the purpose of giving a series of four grand concerts and day and night *fêtes* at the said Gardens and Hall on those days respectively at the rent or sum of £100 for each of the said days. The said Caldwell & Bishop agree to find and provide at their own sole expense, on each of the aforesaid days, for the amusement of the public and persons then in the said Gardens and Hall, an efficient and organized military and quadrille band, the united bands to consist of from thirty-five to forty members; *al fresco* entertainments of various descriptions; colored minstrels, fireworks, and full illuminations; a ballet or *divertissement*, if permitted; a wizard, and Grecian statues; tight-rope performances; rifle galleries; air-gun shooting; Chinese and Parisian games; boats on the lake, and (weather permitting) aquatic sports; and all and every other entertainment as given nightly during the months and times above mentioned. And the said Caldwell & Bishop also agree that the before-mentioned united bands shall be present and assist at each of the said concerts, from its commencement until 9 o'clock at night; that they will, one week at least previous to the above mentioned dates, underline in bold type in all their bills and advertisements, that Mr. Sims Reeves and other artistes will sing at the said gardens on those dates respectively, and that the said Taylor & Lewis shall have the right of placing their boards, bills, and placards in such number and manner (but subject to the approval of the said Caldwell & Bishop), in and about the entrance to the said gardens, and in the said grounds, one week at least previous to each of the above-mentioned days respectively, all bills so displayed being affixed on boards. And the said Caldwell & Bishop also agree to allow dancing on the new circular platform after 9 o'clock at night, but not before. And the said Caldwell & Bishop also agree not to allow the firework display to take place till a quarter past 11 o'clock at night. And, lastly, the said Caldwell & Bishop agree that the said Taylor & Lewis shall be entitled to and shall be at liberty to take and receive, as and

for the sole use and property of them, the said Taylor & Lewis, all moneys paid for entrance to the Gardens, Galleries, and Music Hall, and Firework Galleries, and that the said Taylor & Lewis may, in their own discretion, secure the patronage of any charitable institution in connection with the said concerts. And the said Taylor & Lewis agree to pay the aforesaid respective sum of £100 in the evening of the said respective days, by a crossed check, and also to find and provide, at their own sole cost, all the necessary artistes for the said concerts, including Mr. Sims Reeves, God's will permitting.

(Signed) "J. CALDWELL,

"Witness (Signed) S. DENIS. CHAS. BISHOP."

On June 11th the Music Hall was destroyed by an accidental fire, so that it became impossible to give the concerts. Under these circumstances a verdict was returned for the plaintiff, with leave reserved to enter a verdict for the defendants on the second and third issues.

Petersdorff, in Hilary Term, 1862, obtained a rule to enter a verdict for the defendants generally.

The rule was argued in Hilary Term, 1863 (January 28th), before Cockburn, C.J., Wightman, Crompton, and Blackburn, JJ.

H. Tindal Atkinson showed cause.

BLACKBURN, J. In this case the plaintiffs and defendants had, on May 27th, 1861, entered into a contract by which the defendants agreed to let the plaintiffs have the use of the Surrey Gardens and Music Hall on four days, then to come—viz., June 17th, July 15th, August 5th, and August 19th, for the purpose of giving a series of four grand concerts, and day and night *fêtes*, at the Gardens and Hall, on those days respectively; and the plaintiffs agreed to take the Gardens and Hall on those days, and pay £100 for each day.

The parties inaccurately call this a "letting," and the money to be paid, a "rent;" but the whole agreement is such as to show that the defendants were to retain the possession of the Hall and Gardens, so that there was to be no demise of them, and that the contract was merely to give the plaintiffs the use of them on those days. Nothing, however, in our opinion, depends on this. The agreement then proceeds to set out various stipulations between the parties as to what each was to supply for these concerts and entertainments, and as to the manner in which they should be carried on. The effect of the whole is to show that the existence of the Music Hall in the Surrey Gardens, in a state fit for a concert, was essential for the fulfilment of

the contract—such entertainments as the parties contemplated in their agreement could not be given without it.

After the making of the agreement, and before the first day on which a concert was to be given, the Hall was destroyed by fire. This destruction, we must take it on the evidence, was without the fault of either party, and was so complete, that in consequence the concerts could not be given as intended. And the question we have to decide is whether, under these circumstances, the loss which the plaintiffs have sustained is to fall upon the defendants. The parties, when framing their agreement, evidently had not present to their minds the possibility of such a disaster, and have made no express stipulation with reference to it, so that the answer to the question must depend upon the general rules of law applicable to such a contract.

There seems no doubt that where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents the performance of his contract has become unexpectedly burdensome or even impossible. The law is so laid down in 1 Roll. Abr. 450, Condition (G), and in the note 2 to Walton *v.* Waterhouse, 2 Wms. Saund. 421*a*, 6th ed., and is recognized as the general rule by all the judges in the much discussed case of Hall *v.* Wright, E. B. & E. 746 (E. C. L. R. Vol. XCVI.). But this rule is only applicable when the contract is positive and absolute, and not subject to any condition either express or implied ; and there are authorities which, as we think, establish the principle that where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done ; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.

There seems little doubt that this implication tends to further the great object of making the legal construction such as to fulfil the intention of those who entered into the contract. For in the course of affairs men in making such contracts in general would, if it were brought to their minds, say that there should be such a condition.

Accordingly in the civil law, such an exception is implied in every obligation of the class which they call *obligatio de certo corpore*. The rule is laid down in the Digest, lib. XLV., tit. 1, *de verborum obligationibus*, 1, 33. "Si Stichus certo die dari promissus, ante diem moriatur, non tenetur promissor." The principle is more fully developed in 1, 23. "Si ex legati causa, aut ex stipulatû hominem certum mihi debeas: non aliter post mortem ejus tenearis mihi, quam si per te steterit, quominus vivo eo eum mihi dares: quod ita fit, si aut interpellatus non dedisti, aut occidisti eum." The examples are of contracts respecting a slave, which was the common illustration of a certain subject used by the Roman lawyers, just as we are apt to take a horse; and no doubt the propriety, one might almost say necessity, of the implied condition is more obvious when the contract relates to a living animal, whether man or brute, than when it relates to some inanimate thing (such as in the present case a theatre) the existence of which is not so obviously precarious as that of the live animal, but the principle is adopted in the civil law as applicable to every obligation of which the subject is a certain thing. The general subject is treated of by Pothier, who in his Traité des Obligations, partie 3, ch. 6, art. 3, § 668, states the result to be that the *debtor corporis certi* is freed from his obligation when the thing has perished, neither by his act, nor his neglect, and before he is in default, unless by some stipulation he has taken on himself the risk of the particular misfortune which has occurred.

Although the civil law is not of itself authority in an English court, it affords great assistance in investigating the principles on which the law is grounded. And it seems to us that the common law authorities establish that in such a contract the same condition of the continued existence of the thing is implied by English law.

There is a class of contracts in which a person binds himself to do something which requires to be performed by him in person; and such promises—for example, promises to marry, or promises to serve for a certain time, are never in practice qualified by an express exception of the death of the party; and therefore in such cases the contract is in terms broken if the promissor dies before fulfilment. Yet it was very early determined that, if the performance is personal, the executors are not liable. Hyde *v.* The Dean of Windsor, Cro. Eliz. 552, 553. See 2 Wms. Exors. 1560, 5th ed., where a very apt illustration is given. "Thus," says the learned author, "if an author undertakes to compose a work, and dies before completing it, his executors are discharged from this contract, for the under-

taking is merely personal in its nature, and, by the intervention of the contractor's death, has become impossible to be performed." For this he cites a dictum of Lord Lyndhurst in Marshall *v.* Broadhurst, 1 Tyr. 348, 349, and a case mentioned by Patteson, J., in Wentworth *v.* Cock, 10 A. & E. 42, 45–46 (E. C. L. R. Vol. XXXVII.). In Hall *v.* Wright, E. B. & E. 746, 749 (E. C. L. R. Vol. XCVI.), Crompton, J., in his judgment, puts another case. "Where a contract depends upon personal skill, and the act of God renders it impossible, as, for instance, in the case of a painter employed to paint a picture who is struck blind, it may be that the performance might be excused."

It seems that in those cases the only ground on which the parties or their executors can be excused from the consequences of the breach of the contract, is, that from the nature of the contract there is an implied condition of the continued existence of the life of the contractor, and perhaps in the case of the painter, of his eyesight. In the instances just given, the person, the continued existence of whose life is necessary to the fulfilment of the contract, is himself the contractor, but that does not seem in itself to be necessary to the application of the principle, as is illustrated by the following example. In the ordinary form of an apprentice deed, the apprentice binds himself in unqualified terms to "serve until the full end and term of seven years to be fully complete and ended," during which term it is covenanted that the apprentice his master "faithfully shall serve," and the father of the apprentice in equally unqualified terms binds himself for the performance by the apprentice of all and every covenant on his part. See the form, 2 Chitty on Pleading, 370, 7th ed., by Greening. It is undeniable that if the apprentice dies within the seven years, the covenant of the father that he shall perform his covenant to serve for seven years is not fulfilled, yet surely it cannot be that an action would lie against the father. Yet the only reason why it would not is that he is excused because of the apprentice's death.

These are instances where the implied condition is of the life of a human being, but there are others in which the same implication is made as to the continued existence of a thing. For example, where a contract of sale is made amounting to a bargain and sale, transferring presently the property in specific chattels, which are to be delivered by the vendor at a future day; there, if the chattels, without the fault of the vendor, perish in the interval, the purchaser must pay the price, and the vendor is excused from performing his contract to deliver, which has thus become impossible.

That this is the rule of the English law is established by the case of Rugg *v.* Minett, 11 East, 210, where the article that perished before delivery was turpentine, and it was decided that the vendor was bound to refund the price of all those lots in which the property had not passed ; but was entitled to retain without deduction the price of those lots in which the property had passed, though they were not delivered, and though in the conditions of sale, which are set out in the report, there was no express qualification of the promise to deliver on payment. It seems in that case rather to have been taken for granted than decided that the destruction of the thing sold before delivery excused the vendor from fulfilling his contract to deliver on payment.

This also is the rule in the civil law, and it is worth noticing that Pothier, in his celebrated Traité du Contrat de Vente,[1] treats this as merely an example of the more general rule that every obligation *de certo corpore* is extinguished when the thing ceases to exist. See Blackburn on the Contract of Sale, p. 173.

The same principle seems to be involved in the decision of Sparrow *v.* Sowgate, W. Jones, 29, where, to an action of debt on an obligation by bail, conditioned for the payment of the debt or the render of the debtor, it was held a good plea that before any default in rendering him the principal debtor died. It is true that was the case of a bond with a condition, and a distinction is sometimes made in this respect between a condition and a contract. But this observation does not apply to Williams *v.* Lloyd, W. Jones, 179. In that case the count, which was in *assumpsit*, alleged that the plaintiff had delivered a horse to the defendant, who promised to redeliver it on request. Breach, that though requested to redeliver the horse he refused. Plea, that the horse was sick and died, and the plaintiff made the request after its death ; and on demurrer it was held a good plea, as the bailee was discharged from his promise by the death of the horse without default or negligence on the part of the defendant. "Let it be admitted," say the Court, "that he promised to deliver it on request, if the horse die before, that is become impossible by the act of God, so the party shall be discharged, as much as if an obligation were made conditioned to deliver the horse on request, and he died before it." And Jones, adds the report, cited 22 Ass. 41, in which it was held that a ferryman who had promised to carry a horse safe across the ferry was held chargeable for the drowning of the animal only because he had overloaded the boat, and it was agreed that nothwithstanding the promise no action

[1] See Part IV., § 307, etc., and Part II., ch. 1, § 1, art. 4, § 1.

would have laid had there been no neglect or default on his part.

It may, we think, be safely asserted to be now English law, that in all contracts of loan of chattels or bailments if the performance of the promise of the borrower or bailee to return the things lent or bailed, becomes impossible because it has perished, this impossibility (if not arising from the fault of the borrower or bailee from some risk which he has taken upon himself) excuses the borrower or bailee from the performance of his promise to redeliver the chattel.

The great case of Coggs *v.* Bernard, 1 Smith's L. C. 171, 5th ed., 2 L. Raym. 909, is now the leading case on the law of bailments, and Lord Holt, in that case, referred so much to the civil law that it might perhaps be thought that this principle was there derived direct from the civilians, and was not generally appliable in English law except in the case of bailments; but the case of Williams *v.* Lloyd, W. Jones, 179, above cited, shows that the same law had been already adopted by the English law as early as the Book of Assizes. The principle seems to us to be that, in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance.

In none of these cases is the promise in words other than positive, nor is there any express stipulation that the destruction of the person or thing shall excuse the performance; but that excuse is by law implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel. In the present case, looking at the whole contract, we find that the parties contracted on the basis of the continued existence of the Music Hall at the time when the concerts were to be given, that being essential to their performance.

We think, therefore, that the Music Hall having ceased to exist, without fault of either party, both parties are excused, the plaintiffs from taking the gardens and paying the money, the defendants from performing their promise to give the use of the Hall and gardens and other things. Consequently the rule must be absolute to enter the verdict for the defendants.

Rule absolute.

BAILY *v.* DE CRESPIGNY.

IN THE QUEEN'S BENCH, JANUARY 20, 1869.

[*Reported in Law Reports, 4 Queen's Bench*, 180.]

DECLARATION. That defendant by deed demised, among other hereditaments, to the plaintiff a certain piece or parcel of ground situate in the parish of St. Giles, Camberwell, in the county of Surrey, and all that messuage or tenement, together with other erections and buildings then recently erected and built thereon by plaintiff, for eighty-nine years from March 25th, 1840, at a rent thereby reserved; and defendant thereby, among other things, covenanted with the plaintiff that neither he, the defendant, nor his heirs, nor his assigns, should or would, during the term, permit to be built, on the paddock fronting the premises demised by the deed toward the north, any messuage or dwelling-house, coach-house, or stable, or other erection, save and except summer or pleasure houses in private garden ground, and also a church or chapel at the eastern extremity of the paddock. Averment of the performance of all conditions precedent, etc. Breach, that during the term the defendant permitted to be built on the paddock certain erections other than those by the deed excepted, to wit, a railway station with the appurtenances thereof, including water-closets and urinals. That by reason of the premises, the plaintiff has been greatly annoyed and damnified in the enjoyment of the land, messuage, and hereditaments demised by the deed as aforesaid, and the value of the land and messuage and of the term has been much depreciated, and the amenity and comfort of the land and messuage as a residence have been deteriorated by the interference with the prospect therefrom, by reason of the erections, and by reason of the smoke proceeding from the chimneys of the railway station and premises, and by reason of the plaintiff's messuage being overlooked by the windows of the railway station and premises; and otherwise, by reason of the premises, the plaintiff has been prevented from having as beneficial a use and occupation of the lands as he otherwise would have had, and has been otherwise damnified.

Second breach, that, after the making of the deed and demise, and during the term thereby granted, the defendant assigned the paddock to the London, Brighton & South Coast Railway Company, and that the company, after the assignment and during the term, and while they were possessed of the

paddock, by virtue of the assignment from the defendant, erected and built the railway station, with the appurtenances on the paddock, contrary to the covenant, to the damage of the plaintiff as above mentioned.

Plea. That, before the committing of the alleged breaches, and after the making of the deed, the London, Brighton & South Coast Railway Company required to take and purchase the paddock under the powers given them by "The London, Brighton & South Coast Railway (New Lines) Act, 1862," and for the purposes for which they were by the act empowered to purchase and take the paddock. And that the paddock was land which the company were empowered by the act to purchase and take compulsorily for the purposes of their undertaking, authorized by the act. And that, after the making of the deed, and before the committing of the alleged breaches, the company did, under and according to the power conferred upon them by the act, and by virtue of the act, compulsorily purchase and take the paddock, and for the completion of the purchase the defendant did, by deed, convey the paddock to the company and their successors, which is the assignment in the declaration mentioned; whereupon and whereby the company, under and by virtue of the act, became seized in fee of the paddock, and the company, being so seized, built on the ground or paddock the erections in the declaration mentioned, which were erections reasonably required by them for the purposes of their undertaking authorized by the act, which building by the company is the building complained of in the breaches. And that, except as aforesaid, the defendant did not permit the erections to be built.

Replication. That, although reasonable, still it was neither necessary nor compulsory for the railway company to build the station on the land in question.

Demurrers to the plea and replication and joinder.

F. M. White for the plaintiff.

Raymond for the defendant.

The judgment of the Court (Cockburn, C.J., Lush, Hannen, and Hayes, JJ.) was delivered by

Hannen, J. This was an action on a covenant contained in a lease of certain premises granted by the defendant to the plaintiff in 1840, for a term of eighty-nine years, whereby the defendant covenanted that "neither he nor his assigns should or would, during the term, permit to be built any messuage, etc., on a paddock fronting the demised premises." The breaches alleged are: First, that the defendant during the term permitted a railway station to be built on the paddock. Sec-

ond, that the defendant assigned the paddock to the London & Brighton Railway Company, who erected the railway station on the paddock.

To this declaration the defendant pleaded that, after the making of the deed, the railway company required to take the paddock under powers given them by Act of Parliament, 1862, for purposes for which they were by the act empowered to take the same ; that the paddock was land which the company were empowered to take compulsorily for the purposes of the undertaking authorized by the act ; and that the company, under the powers so conferred, did compulsorily purchase and take the paddock ; and that the assignment by defendant to the company was the assignment in completion of such compulsory purchase ; that the company afterward built on the paddock the erections complained of, which were erections reasonably required for the purposes of the undertaking authorized by the act, and that, except as aforesaid, the defendant did not permit the said erections to be built. The plaintiff demurred to this plea, and also replied that the erections, though reasonable, were not necessary or compulsory for the company to build. To this replication there was a demurrer.

It must be taken on these pleadings that the assignment by the defendant to the railway company was altogether made under the requirements of the act of Parliament, and without any stipulation introduced into the conveyance by the vendor or the purchaser, which would alter its character as an act done by the defendant in obedience to the command of the legislature. The seventy-fifth section of the Lands Clauses Consolidation Act, 1845, is imperative that the owner of lands shall, on the performance of the conditions imposed on the company, when required so to do, duly convey the lands to the promoters, or as they shall direct, and in default thereof it shall be lawful for the promoters to execute a deed poll, declaring the fact of such default having been made, and thereupon all the estate and interest in such lands, capable of being sold and conveyed by such owner, shall vest absolutely in the promoters of the undertaking.

We think that no distinction can be drawn btween the case of an owner of lands who does that which it is his duty to do—namely, conveys to the company, and one who by refusing to convey obliges the company to obtain a title to the lands by the execution of a deed poll. In the one case, as in the other, the transfer of the title is compelled by the legislature, and it cannot be supposed that it was intended that the landowner who acts solely in obedience to the law should be in a worse position

than one who refuses compliance. In either case the railway company must be regarded as the assignee of the land, not by the voluntary act of the former owner, but by compulsion of law.

The substantial question, therefore, raised on this record is whether the defendant is discharged from his covenant by the subsequent act of Parliament, which put it out of his power to perform it.

We are of opinion that he is so discharged on the principle expressed in the maxim, "*Lex non cogit ad impossibilia.*"

We have first to consider what is the meaning of the covenant which the parties have entered into. There can be no doubt that a man may by an absolute contract bind himself to perform things which subsequently become impossible, or to pay damages for the non-performance, and this construction is to be put upon an unqualified undertaking, where the event which causes the impossibility was or might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor.

But where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterward happens. It is on this principle that the act of God is in some cases said to excuse the breach of a contract. This is in fact an inaccurate expression, because, where it is an answer to a complaint of an alleged breach of contract that the thing done or left undone was so by the act of God, what is meant is that it was not within the contract; for, as is observed by Maule, J., in Canham *v.* Barry,[1] a man might by apt words bind himself that it shall rain to-morrow or that he will pay damages. This is the explanation of the case put by Lord Coke in Shelley's Case:[2] "If a lessee covenants to leave a wood in as good a plight as the wood was at the time of the lease, and afterward the trees are blown down by tempest, he is discharged of his covenant," because it was thought that the covenant was intended to relate only to the tenant's own acts, and not to an event beyond his control, producing effects not in his power to remedy. See Shep. Touch. 173. It is on this principle that it has been held that an impossibility, arising from an act of the legislature subsequent to the contract, discharges the contractor from liability. Again, to quote an observation of Maule, J., in

[1] 15 C. B. at p. 619; 24 L. J. (C. P.) at p. 106. [2] 1 Rep. at p. 98*a*.

Mayor of Berwick *v.* Oswald,[1] there is nothing "to prevent parties, if they choose by apt words to express an intention so to do, from binding themselves by a contract as to any future state of the law . . . but people in general must always be considered as contracting with reference to the law as existing at the time of the contract. . . . And the words showing a contrary intention ought to be pretty clear to rebut that presumption." To hold a man liable by words, in a sense affixed to them by legislation subsequent to the contract, is to impose on him a contract he never made. This is the principle of that which was laid down in Brewster *v.* Kitchell,[2] that "where H. covenants not to do an act or thing which was lawful to do, and an act of Parliament comes after and compels him to do it, the statute repeals the covenant. So if H. covenants to do a thing which is lawful, and an act of Parliament comes in and hinders him from doing it, the covenant is repealed."

To apply the foregoing observations to the present case: The defendant has covenanted that his "assigns" shall not build. The word "assigns" is a term of well-known signification, comprehending all those who take either immediately or remotely from or under the assignor, whether by conveyance, devise, descent, or act of law. Spencer's Case.[3] The defendant when he contracted used the general word "assigns," knowing that it had a definite meaning, and he was able to foresee and guard against the liabilities which might arise from his contract so interpreted. The legislature by compelling him to part with his land to a railway company, whom he could not bind by any stipulation, as he could an assignee chosen by himself, has created a new kind of assign, such as was not in the contemplation of the parties when the contract was entered into. To hold the defendant responsible for the acts of such an assignee is to make an entirely new contract for the parties. On the other hand, to confine the word "assigns" to those who take by the voluntary act of the assignor would not, as was suggested in argument, limit the operation of the covenant to his immediate grantee, because all those who take from the first assignee do so in consequence of the original voluntary act of the assignor, and it was his own fault that he assigned at all, or that he did not in the original conveyance guard against the acts of subsequent assignees. To exempt him from liability for such acts would be contrary to the intention of the parties, to be collected from their words, interpreted according to their known ordinary signification.

[1] 3 E. & B. at p. 665; 23 L. J. (Q. B.) at p. 324.

[2] 1 Salk. 198.

[3] 5 Rep. 16.

It was, indeed, conceded on the argument by the plaintiff's counsel, that the defendant would not be liable for all acts of the railway company, as he would have been for the acts of any other assignee ; but it was contended that the defendant was relieved from liability on his covenant as to those acts only which the company was required by the act of Parliament to do, and not as to those which the company was merely empowered to do.

We do not think that this distinction is well founded. The rule laid down in Brewster *v.* Kitchell[1] rests upon this ground, that it is not reasonable to suppose that the legislature, while altering the condition of things with reference to which the covenantor contracted, intended that he should remain liable on a covenant which the legislature itself prevented his fulfilling ; but the covenantor in this case is equally disabled from preventing the railway company from doing those things which it is empowered to do, as those which it is required to do ; why then should there be a difference in the liability of the covenantor with respect to the one and the other ?

Could not prevent transfer

But, assuming that the imposing on the defendant by the legislature of assigns whom he could not control, would, without more, free him from the engagements which he entered into with reference to assigns whom he could control, it remains necessary to deal with the argument that, though the company was empowered to take the lands free from the restrictions upon building, this was only on condition of paying full compensation for what they got, and that it must be supposed that the defendant obtained from the company not only the value of the land as he held it, encumbered with a covenant not to build, but also what was deemed a fair consideration for the right to build.

It appears to be assumed in this argument that the difference between the price of the land encumbered with the covenant not to build and the price of it freed from that covenant, would be the amount of damages to be paid by the defendant to the plaintiff in the present action. But that is not so ; the plaintiff, if entitled to recover at all in this action, would be entitled to the damage he had sustained by the breach of the covenant, even if these damages should exceed the whole value of the land taken. No doubt, if the legislature had in express terms, or by necessary implication from its language, given to persons in the defendant's situation a remedy over against the railway company in respect of acts done by the company, this would have indicated that the legislature did not intend that the de-

[1] 1 Salk. 198.

fendant should be freed from liability on his covenant, although he was disabled from performing it. But we cannot find in the railway acts any express or implied enactment to this effect. It has been already pointed out that there is no relation between the compensation which the defendant would be entitled to for his land and the damages for which he would be liable to the plaintiff. How could it be possible for the defendant to lay before the compensation jury evidence of the extent of his liability on such a covenant as that under consideration? How could he, in an inquiry to which the plaintiff was no party, offer evidence of the injury which the plaintiff might by any possibility sustain in the uncertain event of the company erecting a station or other building on the land taken?

Further, if the covenant of the defendant is to be considered as broken by the act of the railway company so as to entitle the plaintiff to damages, it must be deemed to carry with it the other consequences of a breach of contract. Thus, if the situation of the plaintiff and the defendant in this case had been reversed, and the covenant not to build on land adjoining the demised premises had been entered into by a lessee, with the usual proviso for re-entry in the event of breach of any covenant, the lessee would have been liable to forfeiture of his whole interest by reason of an act over which he had no control; and the railway company would be liable, if the plaintiff's contention be correct, to pay, by way of compensation for a piece of land taken, the whole value of the interest of the lessee in the adjoining estate.

The solution of the case appears to be, that the plaintiff is one of a numerous class of persons injured by the construction of a railway, for whom the legislature has not provided compensation. This may be illustrated by reference to the special damage claimed in the declaration. It is there alleged that the amenity and comfort of the land demised have been diminished by reason of the prospect therefrom being interfered with, and by being overlooked by the windows of the station, with the appurtenances, including water-closets and urinals. These are heads of damage for which railway companies are not in ordinary circumstances bound to give compensation, but for which the defendant would be liable in an action on his covenant.

We do not think that it was the intention of the legislature to make a railway company liable for such damages in the exceptional case of a person, in the position of the plaintiff, having taken a covenant from his lessor on the terms of that under consideration, or that, if such had been the intention of the legislature, so peculiar a head of compensation as that now

suggested—namely, for liability to damages for breach of collateral covenants resulting from the taking of lands, would have been left to be conjectured from the vague language of the Lands Clauses Consolidation Act.

For these reasons we are of opinion that our judgment ought to be for the defendant.

Judgment for the defendant.

THE PEOPLE OF THE STATE OF NEW YORK *v.* THE GLOBE MUTUAL LIFE INSURANCE COMPANY.

IN THE COURT OF APPEALS OF NEW YORK, JANUARY 23, 1883.

[*Reported in* 91 *New York Reports* 174.]

APPEAL from order of the General Term of the Supreme Court, in the Third Judicial Department, entered upon an order made December 1st, 1882, which affirmed an order of Special Term dismissing a claim presented by James C. Mix upon the fund in the hands of the receiver of the defendant.

The facts were stipulated substantially as follows :

Defendant was a registered policy life insurance company, organized under chapter 902, Laws of 1869. In December, 1876, said Mix entered into its employment as general agent, under a contract by which he was to receive a specified annual salary for a term of not less than five years. In May, 1879, the superintendent of the insurance department made the certificate provided for by § 7 of said act, and delivered it to the attorney-general, who thereupon commenced this action and obtained an order therein restraining defendants, its officers, etc., from the further prosecution of its business or the exercise of any of its corporate franchises. A receiver of the corporation was duly appointed and it was dissolved. Mix continued in the discharge of his duties under the contract until June 15th, 1879, when he was notified by the receiver of his appointment, and of the dissolution of the company.

Edward C. James for appellant.

Geo. W. Wingate for receiver.

John C. Keeler for attorney-general.

FINCH, J. There was no breach of the contract between Mix and the insurance company by either of the parties. It was in process of continued performance according to its terms, and was unbroken at the moment when the injunction order was

served. That operated upon both parties at the same instant, and perpetuated the then existing rights and conditions. Before its service the company had done nothing to prevent performance, and we must assume was both ready and able to perform. It had done no act which amounted to a refusal, or which made it unable to carry out its contract. For aught that appears it would have done so if let alone. But it was not permitted to perform. The State, by the injunction order operating alike upon the company and its agents, paralyzed the action of both the contracting parties, so that neither could perform, or put the other in the wrong. Thereupon the company could not refuse, and did not refuse. To put it in the wrong, and make it liable for a breach, required action on the part of Mix. As a condition precedent he was bound to show both ability and readiness to perform on his part. Shaw *v.* Republic Life Ins. Co., 69 N. Y. 292-293; James *v.* Burchell, 82 N. Y. 113. He could do neither. Performance by him had become illegal. It would have been a criminal contempt, and possibly a misdemeanor. There could be neither readiness nor ability to do the forbidden and unlawful acts. Jones *v.* Knowles, 30 Me. 402. So that from the necessity of the case, as there was no breach on either side before the injunction, so there could be none after. What had happened was a dissolution of the contract by the sovereign power of the State, rendering performance on either side impossible. And this result was within the contemplation of the parties, and must be deemed an unexpressed condition of their agreement. One party was a corporation. It drew its vitality from the grant of the State, and could only live by its permission. It existed within certain defined limitations, and must die whenever its creator so willed. The general agent who contracted with it did so with knowledge of the statutory conditions, and these must be deemed to have permeated the agreement, and constituted elements of the obligation. People *v.* Security Life Ins. Co., 78 N. Y. 115. Then, too, the subject-matter of the contract was that of skilled personal services to be rendered by one and received by the other. It was inherent in the bargain that a substituted service would not answer. The company were not bound to accept another's performance instead of the chosen agent's, nor was he in turn bound to work for some other master. The contract in its own nature was dependent upon the continued life of both parties. With the natural death of one, or the corporate death of the other, the contract must inevitably end. So that, in its own inherent nature, by the unexpressed conditions subject to which it was made, and by

the decree enjoining both parties at the same moment from further performance, the contract was terminated and no breach existed.

It is easy to see how the situation of Mix differs from that of the policy-holders. We held in the Security case that the latter were creditors and stood upon a breach of their contract; but that breach was not the dissolution of the company. It antedated such dissolution and was the prior cause, of which the latter was the consequence. The reserve required by law was essential to the safety of the policy-holders. A covenant to maintain it was implied in every contract of insurance. That covenant the company broke by its own neglect, for which it alone was assumed to be responsible. The State found these contracts broken, and for that reason interfered, and when its decree of dissolution came it had to deal with broken contracts and treated them as it found them. The same distinction explains the English cases which were commended to our careful attention. Yelland's Case, L. R., 4 Eq. 350; Clarke's Case, L. R., 7 Eq. 550; Logan's Case, L. R., 9 Eq. 149; Maclure's Case, L. R., 5 Ch. App. 737; Dean & Gilbert's Case, Law Jour., 41 Ch. (N. S.) 476. In all of them the companies stopped payment before any intervention of the law, and this being done by open and public notice, amounted to a voluntary refusal of performance, and, therefore, a breach of contract, established before the winding-up orders were made and the liquidators appointed. When the Court interfered it found broken contracts and a liability for a breach already existing, and dealt with what it found. It did not itself break what was already broken. Still another class of cases is obviously different. People *v.* National Trust Co., 82 N. Y. 283. They are such as affect property rights and survive the death of the parties. Performance can be made by assignees or successors, and nothing in the essence of the agreement depends upon the life of the parties, or forbids its complete execution by others. And in all of the cases thus cited there was no incapacity affecting both parties alike. The one suing for a breach was free, so far as he was concerned, to offer performance, and had the necessary ability. He could thus put his adversary in the wrong, while here the same blow, at the same instant, stopped performance on both sides and made it illegal on the part of either.

But exactly at this point the learned counsel for the appellant interposes a proposition which presents a difficulty. Practically conceding most that we have said, he insists that the contract is only dissolved when its destruction comes from an out-

side and independent force, operating separately, and not occasioned directly or indirectly by the act or omission of the party pleading it as an excuse. In other words such party must be innocent and blameless in respect to the *vis major* which dissolves the contract, and if not so, cannot plead as an excuse what practically is his own fault and act. And our attention is directed to this feature as characterizing the cases in which the agreements were held to have been ended. They are grouped in the appellant's points and need not to be repeated. He has stated their purport correctly. In all of them both parties were innocent of and blameless for the outside and independent agency which dissolved the contract. And the argument is now pressed that in the present case the company was not only not blameless for its dissolution, but that resulted from its own acts or omissions, was directly caused by them, and, therefore, such dissolution must be deemed its own act, which it cannot plead as an excuse. This leads to the inquiry whether the company was so the responsible cause of the action of the State as to make the dissolution its own act.

The answer is that no such fact is shown, nor is it a necessary inference from the facts which do appear. The judgment of dissolution is not here. We only know from the stipulation of the parties that the company was organized under chapter 902 of the Laws of 1869, and that the superintendent of insurance made the certificate provided for in § 7 of said act, and the attorney-general thereupon commenced the action for dissolution. The superintendent probably acted because the company's reserve had fallen below the lawful and safe level. Perhaps we ought to presume as much as that, but if so, the result may have happened from causes beyond the company's control and without its fault. It was its duty to invest the reserve and keep it interest-bearing. It may have done so with entire prudence at the time, and in strict accordance with the law, and then all values have so shrunk and dwindled from commercial causes as to have impaired the reserve. In such case the dissolution would have come from outside and foreign forces, operating independently and both beyond control. If it be said the company was still the indirect cause of the dissolution since it made the investments and failed to repair and strengthen them to the legal limit, the answer may be that it could not do it. The rule must not be pushed to an extreme. Thus, in the case of the sailor having a running contract for service with the shipowner, and sent home by a naval court as a witness against the captain for shooting one of the crew, and unable to return to the ship after the trial, and whose contract

was held to be dissolved (Melville *v.* DeWolf, 4 E. & B. 844), similar suggestions might have been made. It could have been said that it was his duty to return to the ship, but that such return had become impossible, without his fault, or that of the shipowner, was held sufficient. Then, too, it could have been argued that if the sailor had not been present at and seen the murder, which was his voluntary act, and which he might have avoided, the law would not have sent him home. Of course nobody thought of pushing the rule to such an extreme; nor must it be done here. The sailor was not bound to foresee that his innocent and blameless presence at the scene of the murder would involve a dissolution of his contract through the intervention of the law; nor the company that its investments, honestly and prudently made, would shrink beyond repair, and bring down a dissolution by the State. If, in such case, in some sense, such dissolution may be deemed the act of the company; in a similar sense, and through the same mode of reasoning, we might, in a case of master and servant, trace the death of the former to his own negligence in eating or drinking, or exposure to heat and cold, and so determine his non-performance to be inexcusable, and to draw after it damages for a breach. As it is thus evident that a man may be, in some sense, the occasion, or even the indirect cause of his own death, and in the same sense blamable for it, without its being, in a legal sense, and considered as a *vis major*, his own act; so a corporation may be said, through the conduct of its officers, to have, in some sort, occasioned its own corporate death, while yet it would remain true that its dissolution by the independent force of the State would be not its own act; not at all the product of its own volition; and not a breach by it of its contracts previously unbroken. Especially is this true as between the company and its own officers contracting with it. One of these may be innocent himself of any wrongful act or neglect, and yet it is inherent in the nature of his contract that he takes the risk of such act, or neglect, on the part of the other officers, as may tend, under the law, to produce a dissolution, if such dissolution in fact occurs. That possibility entered into his contract, when made, and belonged to it as an inevitable condition, for its complete performance depended upon the corporate life, and that under the law upon the fulfilment of the law's conditions. In the event of such corporate death the motive of the State, or the ground of its act is wholly immaterial. Its risk was upon the contractor, whatever its cause or occasion; and, however it may have been provoked or induced, it must be deemed the act of the State, and not of the corporate

body. And it is the independent act of the State, for although the reserve may have fallen below the prescribed level, a dissolution is not the necessary consequence. That may follow, or may not follow. The superintendent of insurance may make the certificate which sets the law in motion, or may withhold it. The matter lies within his sole discretion and control. He may act or not, as he chooses ; but if he does it is his act, and not the company's ; dependent wholly on his volition and not on that of the corporation ; an independent agency guided by its own motives, and not the act of the company producing its own death.

If it be asked where this doctrine leaves the policy-holders, and their claims for breach of contract, the answer is twofold. Where the dissolution follows an impaired reserve, their contracts, as we have already said, were broken by the company before the State interposed. But their rights go much deeper than that. For while in the Security case, we put those rights upon the ground of breach of contract, we did not at all decide that there was no other. If the State had dissolved this company while its contracts with the policy-holders were entirely unbroken, and by an exercise of sovereign power founded upon motives of public policy, we should still recognize and enforce the rights of policy-holders on a different ground. The assets to be distributed would be the reserve or so much of it as remained. That reserve, as we showed in the Security case, is made up of the excess of premiums paid by the policy-holders in the earlier years of their policies beyond the real cost of insurance to enable them to be carried in later years when the risk should be greater. Practically, therefore, at the date of dissolution the reserve represents the earnings of the policies and the contributions of the policy-holders. And as, in the case of contracts for personal services dissolved without fault by death or the act of the law, the contract is apportioned, and the servant entitled to his actual earnings to the date of dissolution, so the policy-holders would be entitled to the just earnings of their policies to the same date, and have an undoubted equity upon the assets. What they paid in excess and in advance was held by the company to some extent as their trustee and for their benefit, and when it is dissolved they have a claim upon the assets in the nature of an equitable ownership which gives them a right beyond that of mere creditors seeking damages for a breach of contract. To make, and to carry out contracts of insurance is the very object of the corporation, and the sole purpose of and excuse for its existence. The State gives it life for that end, and takes it away

when the result is not reached. It watches it during life to see that it fulfils the purpose for which it was created, and buries it when that purpose fails. And as in the creation of the company, and in its supervision and control the rights of the policy-holders and their safety are the paramount considerations, so they remain paramount when corporate death is inflicted. The blow is struck in their interest, and their equitable claim upon the assets is evident and strong. In distributing such assets a Court of Equity may and must give heed to equitable considerations. The claimant is not suing the company at law, for the corporation is dead. He comes in collision with the policy-holders in equity ; and while he is found to have not even a just debt for damages because of his relation to the company and the nature of his contract, and therefore no shadow of an equity against the assets, the policy-holders resisting his claim are protected by an equity not to be overlooked or disregarded.

Other considerations of very serious import were adverted to by the courts below, which we need not here discuss. What has been said sufficiently indicates our opinion that no error was committed in rejecting the claim of the general agent.

The order should be affirmed.

All concur.

Order affirmed.

ISABELLA HALL *v.* GEORGE WRIGHT.

In the Exchequer Chamber, November 26, 1859.

[*Reported in Ellis, Blackburn & Ellis* 765.]

The plaintiff having appealed against the above decision,[1] the case was argued in the Exchequer Chamber in Hilary Vacation, 1859.[2]

Mellish for the appellant (plaintiff below).

Edward James, *contra*.

On this day, there being a difference of opinion on the Bench, the learned judges delivered judgments *seriatim*.

Watson, B. This was an appeal from the judgment of the Court of Queen's Bench, in which judgment was for the defendant.

The question turns on a special plea. The action was for breach of promise of marriage ; in which the declaration

[1] E. B. & E. 746.—Ed.

[2] February 2d and 4th.

alleged that the defendant promised to marry the plaintiff within a reasonable time, that a reasonable time had elapsed, and that the defendant had refused. The plea was, That, after making the agreement and before any breach thereof, the defendant became and was, and thenceforward hitherto has been, and still is, afflicted with a dangerous bodily disease, which has caused frequent and severe bleedings from his lungs; by reason of which disease the defendant then became, and was thence, and hath hitherto been, and still is, incapable of marriage without the greatest danger to life, and therefore unfit for the marriage state: whereof the plaintiff had notice. In the argument at the bar in this Court, and at the bar and on the Bench in the court below, much discussion took place as to what was the meaning and effect of the plea.

The plea is an excuse: viz., that, before breach, and up to the time of the commencement of the action, the defendant was afflicted by a dangerous bodily disease, and therefore "incapable of marriage," and therefore "unfit for the marriage state." The plea does not properly confess any breach of the promise. This question before us arises after verdict; and every intendment is to be made so as to support the plea if possible. The terms are twofold. "Incapable of marriage" may mean two things, either incapable of going through the ceremony of marriage, or incapable of performing the functions required in the married state. In either view of the case I think the plea good. Certainly these words may be considered to apply to the ceremony of marriage; and then the defendant is not to pay damages by reason of a physical inability. The latter words, "unfit for the marriage state," mean the want of that which, as Lord Stowell expresses it, is a competency "to perform the duties which the married contract enjoins;" Greenstreet *v.* Cumyns.[1] The words "fit," or "not fit," seem to be the apt words to express this state in proceedings in the Ecclesiastical Court; Sparrow *v.* Harrison.[2] Marriage according to our law, as decided in the House of Lords, was a contract requiring a religious ceremony to its validity.[3] Now, according to the rubric, the parties are to declare at the altar that there is no lawful impediment to the marriage, and that with reference to the object and purposes of marriage as there stated. This is declared to be the law of the Church. Here the parties in this case could not without a falsehood make such a solemn declaration. It would be no answer to say that, by modern legislation, the parties may marry otherwise than

[1] 2 Phill. Ca. Ecc. 10.

[2] 3 Curt. 16.

[3] See Regina *v.* Millis, 10 Cl. & F. 534.

according to the rubric ; for we are now declaring what is the contract of marriage. Supposing, this marriage being performed, the wife may at any distance of time, presently or at a future time, have a decree declaring the marriage to be void, it seems to be strange that a man is liable in damages for not doing that which is against law, human and divine. The real ground of my opinion is that this contract is, like many other contracts, subject to conditions incident to their nature ; among others, that the parties remain in health to undergo the ceremony, and do not become "unfit" for marriage, and that the circumstances should not render it contrary to law.

It was conceded, on the argument and in the Court below, that insanity of mind would be an excuse, and that the insane person would not be responsible in damages. If so why not insanity of body ? In each case, as alleged, he is to answer in damages for not marrying ; in each case the marriage is void ; Parmeter *v.* Parmeter ;[1] in each case it is no act of the defendant, but the act of God. It is not a dissolution of the contract, except at election, such as the man refusing to marry on the score of the want of chastity of the intended wife.

With this view of the plea, it is clear that the allegation of notice was immaterial and need not be proved.

In this declaration it is said the defendant "refused to marry." This is explained by this : that this, by itself, constituted no breach before the defendant's illness ; and it shows that before the reasonable time had elapsed he was attacked by the disease. If so, then the reasonable time had not elapsed. The term "reasonable time" refers to health under all the circumstances.

The cases cited in the court below have little or no application in my view of the case : viz., of Paradine *v.* Jane,[2] a covenant to repair a house ; or, 1 Rol. Abr., p. 450, pl. 10, to build a house ; or, Co. Litt. 209 *a*, to enfeoff a stranger ; or to load a ship ; Barker *v.* Hodgson.[3] In these and in all like cases the covenantor or promisor agrees to do the acts, or that the acts shall be done, unconditionally and at all events ; and for this he is liable if living, or his real or personal representative, as the case may be, having assets. It is clear that in one respect death dissolves the contract to marry. Chamberlain *v.* Williamson.[4]

[1] The reporters have been unable to find this case : the authority referred to is perhaps Countess of Portsmouth *v.* Earl of Portsmouth, 1 Hag. C. Ecc. 355.

[2] Aleyn, 26. [3] 3 M. & S. 267. [4] 2 M. & S. 408.

The performance of such contracts is still subject to be excused by subsequently becoming illegal.

An argument was relied on, that this promise might have been made with the knowledge of defendant's infirmity. To this there are two answers : first, the plea alleges that the infirmity arose after the promise of marriage ; secondly, it must from the declaration be taken to be a contract of marriage of the ordinary kind, with all its usual obligations and incidents. If it had been otherwise it should have been so alleged.

I think the judgment of the court below should be affirmed.

Martin, B., then read the judgment of

Bramwell, B. In this case the verdict should be entered for the defendant, if so much of the plea as is proved is an answer to the breach of contract complained of. The averment of notice was not proved ; but that is immaterial, unless the plea, with or without it, is bad. It is good if it justifies the breach complained of. It is good, therefore, if it justifies the not marrying (for a refusal to marry is not marrying) at the time when, but for the reason alleged, the defendant ought to have married. What are the consequences, whether the contract is rescinded or whether the defendant is liable to marry at some other time, or what else may result, I will advert to hereafter. At present, the question is, Does the plea justify the particular breach alleged ? Now the plea alleges that, before and at the time of the berach, the defendant was afflicted by bodily disease which made him incapable of marriage without great danger of his life, and unfit for the married state. The question was at first argued as though this meant an unfitness for sexual intercourse : but Mr. James said it meant, and it appears from the judgment of Erle, J., to mean, not only that, but also an incapacity to bear the fatigue and excitement of the marriage ceremony. It was proved to be true in both its meanings. I think either matter a justification for not marrying.

But it is necessary to examine both ; as some seem to consider the plea merely to mean unfitness for the ceremony of marriage, others the other unfitness I have mentioned. As neither fraud nor illegality is alleged, the excuse for not performing the contract must be found in the terms of the contract itself. The plea therefore assumes that it is a term of the contract declared on, that, in the event named in the plea, the defendant should be excused from marrying : and, as there is no reason why such term should be in this particular contract unless it is in all such contracts, the question is reduced

to this : Is it a term in an ordinary agreement to marry that, if the man from bodily disease cannot marry without danger to his life, and is unfit for marriage from the cause mentioned at the time appointed, he shall be excused marrying then ? The plea assumes it is. I think it is. Of course I admit that parties might stipulate otherwise ; but, if they do not, I think they are implied terms of the ordinary contract.

I quite agree that, where parties can make their own terms, the law ought not lightly to imply any. But there are instances in which it is done from the necessity, or almost necessity, of the case ; and, if ever it is reasonable to do it, it is in the contract to marry. Consider how it is made, and how it is proved ; made without formality, usually without witnesses, perhaps without the word itself being used, or any word of contract, an understanding between the parties, rather than a bargain ; come to, at least very often, in a state when the feelings are much excited ; proved by a variety of acts and conduct which assume the contract to exist. It seems unreasonable to deal with it as with a contract for sale of goods or other business transaction, though, no doubt, the same principle governs both. "All these contracts ought to be looked upon (as Lord Hardwicke said, in the case of Woodhouse *v.* Shepley[1]) with a jealous eye." "They are liable to many mischiefs ; to many dangerous consequences." Per Lord Mansfield, in Lowe *v.* Peers.[2] These mischiefs and dangers would be greater if the engagement was taken to be unconditional and unqualified. That terms are implied in contracts is admitted. Contracts for personal service, for matters dependent on personal capacity, as to write a book or paint a picture, are conditional on the continuance of the ability, mental or corporeal, to perform them. This very contract to marry has an implied condition that the woman shall continue chaste. Other instances might be given. Similar considerations make me think such conditions, then, as the plea assumes, are to be implied in the ordinary contract to marry. Surely, if a man said to a woman, "I have promised to marry you, and must and will, but will never live with you or treat you as a wife," he would not be offering, but refusing, to perform his contract. Leeds *v.* Cook.[3] The contract is a contract to marry and perform the duties of marriage. I think it better to recognize what we all know exists, and to assume it exists for a good purpose, than to affect to ignore it. Besides, there is abundant warranty for so doing. The marriage of an impotent man is null ; and two of the three reasons for matrimony given in the

[1] 2 Atk. 535. [2] 4 Burr. 2225, 2230. [3] 4 Esp. 256.

marriage service involve the capacity for sexual intercourse. Can it be doubted, then, if death were the certain result of the fatigue and excitement of the ceremony, that the defendant would be excused, or that impotency supervening on the promise would excuse him? Could he be bound, in performance of his promise, to commit suicide, or go through a ceremony which would be a nullity? But, if the certainty of a fatal result would excuse, so would great danger of it. If impotency would, so surely should great danger; if death from the exercise of capacity, more so. I desire to speak with all reserve: but to possess the lawful means of gratifying a powerful passion with the alternative of abstaining or perilling life is indeed to incur a risk of "intense misery instead of mutual comfort:" and it does seem to me, with great respect, a great mistake to lose sight of these considerations, and suppose happiness can be found in such a marriage by the gratification of an innocent desire to enjoy the *consortium vitæ* with the man, obtain rank and station as his wife, and be dowable of his lands. Moreover, this is to think only of the woman and not of the man, who might object that her wishes, however innocent, were very unreasonable toward him in wishing him to put himself in the temptation of perilling his life; and he might even doubt the innocence of such a desire, certainly, of wishing him to go through a ceremony which might be fatal to him.

This suggests the following. If the man is not excused, but bound, is the woman bound in such a case? Impossible, one would think. But, if not, it must be on account of some implied condition in the contract. It is not as though the man was in default. She could not refuse to marry, in such a case, on the ground that he had broken his contract by not continuing fit for marrying. For, if so, she might not only refuse to marry him, but maintain an action against him for becoming unfit. That cannot be: he does not thereby break his contract; yet she is excused. If so, so must he be; for, if without default of one party to a contract the other has a right to refuse to perform on the happening of a certain event, it must be assumed, till the contrary appears, that right is common to both. If in such case she could rely on an implied condition to excuse her marrying him, why may not he on one to excuse his marrying her?

The contract to marry has been assimilated to those to which it bears no resemblance. A man contracts to load a ship, and cannot. Well, that is his misfortune; a loss will be sustained by him or the shipowner; and it is convenient that, if he puts no condition in his contract, none should be implied, and that,

if his contract is unconditional, he should bear the loss consequent on his non-performance. So of a contract to sell corn. But in the case of a contract to marry, with supervening impotency, there is a loss which must fall on both, whether the contract is fulfilled or not. It seems to me, then, that sexual intercourse is contemplated by parties who agree to marry as an essential part of their engagement ; that inability for it in one party is an excuse for performance by the other ; that, where such excuse exists without any default in the disabled party, it is contrary to principle to hold that an option is given to the other ; consequently that the right of secession in such case is mutual.

The authorities are in favor of this view. Pothier, *Traité du Mariage*, Part II., ch. 1, Art. 7, § 61. But it is said his authority is impaired by his adding, as a cause of dissolution, " a derangement of fortune, which puts me out of condition to be able to support the charges of the marriage which we had promised to contract." I own I see nothing unreasonable in this, nor anything very different from our law. People who agree to marry, not having the means, agree with an implied condition to wait till they have them ; the legal expression of which is that their engagement is to marry in a reasonable time ; and that does not arrive till their means are sufficient. Suppose, after the engagement, poverty falls on them : that is an excuse for not immediately marrying. Is it reasonable that the woman should wait till the man becomes able to maintain her ? This reasoning may be wrong : still there is Pothier's authority direct on the question in hand. Then there is the opinion of Lord Kenyon in Atchinson *v.* Baker,[1] cited and approved in 1 Parsons on the Law of Contract, 550.[2] Paradine *v.* Jane,[3] and similar cases, cited for the plaintiff, are misapplied. They beg this question. No doubt, if a contract made by the parties is unconditional, death or disease is no excuse : but the question in this case is, Whether the contract is not conditional on the continuance of life and health. Why, if the defendant died before breach, could not his executors be liable ? The answer is, because he has not undertaken to live. Neither has he to continue competent in health. And the one is as much a condition of matrimony as the other. This disposes of Barker *v.* Hodgson.[4] Lord Ellenborough's remark, " Perhaps it is too much to say the freighter was compellable to load his cargo," does not mean he was excused from so doing ; for the plaintiff recovered in respect of the defendant

[1] 2 Peake's N. P. C. 103.
[2] Book III. ch. 11 (3d ed., Boston, 1857).
[3] Aleyn, 26.
[4] 3 M. & S. 267.

not having done so; the damages were for breach of the covenant to do it. What Lord Ellenborough means I imagine to be: that the defendant was not morally compellable, or would not have had specific performance enjoined. It is to me unintelligible, how, if the man is not bound to perform the contract, he can be liable to pay damages for its non-performance.

But, it is said, notice ought to have been given to the plaintiff. In point of right feeling I agree. But the parties here are at law with each other. The defendant says, "I have a legal answer to your legal demand." As a rule, a man is not bound to say why; and I see no reason why he should be in this case of a contract to marry. It may be the defendant communicated to the plaintiff, in the most delicate way, an objection to marriage, but refused to say why. If she chooses to go to law with him, as on a bargain, she must abide by rules of law applicable to all cases of bargains and contracts.

I understand the opinion of Crompton, J., to be rather as above expressed, with this difference. He thinks that, at the utmost, all the defendant was entitled to was to rescind the contract. But, if so, I think the plea good. When is he to rescind? If a contract gives a right to rescind, and fixes no time for rescinding, it need not be done till the time arrives for performance: no previous notice need be given. In truth, such a right to rescind is a right to say "No" when the time arrives for performance. It may be that a person who rescinds must give notice. But when? He does give notice when he refuses. Is he bound to give it earlier? If so, why? In the not very probable case of the lady going to the altar without previous arrangement, surely he might, if afflicted as the defendant is, barely send word, in answer to an invitation to join her, that he would not. In the more probable case of some previous request, he refuses when it is made. In other words, till he refuses there is no breach of contract; and when he refuses he by so doing gives notice he will not perform. Is he bound to say why? I cannot understand why he is. No doubt, if, after his disability arises, he goes on with the engagement, he may well be bound, as that would be evidence that the original contract was not conditioned as I think ordinary contracts to marry are, or would furnish evidence of a fresh contract.

Further, if it is said that the facts proved only justify a postponement of the marriage, I think the plea good. The plaintiff complains that the defendant refused. The defendant says, "When I did, I had a sufficient reason." I do not understand

the breach to be, "You refused, and refused forever." I do not understand such a breach in point of law. I do not understand what is meant by a plea "in excuse or suspension of the performance" as distinguished from one "in discharge of the promise." Hochster *v.* De La Tour[1] turns on the relation of master and servant. If I contract to do a thing, and am sued for not doing it, it is a good defence to say the time for doing it has not arrived: and, I take it, it would be a bad replication to say, "True, but you said you never would." See Avery *v.* Bowden.[2] The plaintiff can only be entitled to recover on these pleadings and proof on the ground that the asserted and proved incompetency is no ground for refusing to marry when the request so to do is made. I am of opinion it is. In short, the defendant here says: "You complain I refused. I admit it; I did so for a good reason, viz., my performance was conditional on my continuing in a competent state; and I ceased to be so." If the plaintiff meant to say the contract was not so conditioned, she should have given evidence (in my opinion) that the contract in this case was not the ordinary contract to marry. If she meant to say there was a new contract evidenced by the engagement continuing after the disability was known, she should have new assigned. But, if she relies on and proves the common contract only, it is in my opinion a good answer to prove that the defendant, when he refused, labored under either of the infirmities proved in this case.

If I am to say whether I think the contract ended by such an event, I say I do; and on this ground: that it is so vitally for the benefit of both parties that that should be the agreement between them, that common sense requires it to be so implied. The disability of the defendant, if not incurable, was one of indefinite duration, and of a lasting character. Had it been that he broke a leg, or was afflicted with a fever which disabled him for marriage at the time appointed, I should have thought him not liable to an action for not marrying then, but bound to marry on his recovering. This last consideration seems to me to suggest an argument in favor of the contract being conditional as suggested. For in ordinary contracts, if not liable at the day appointed, a person would not be at another time; but in this contract it is absurd to suppose that, if a day was named for a marriage and the man broke his leg, was ill of a fever, lost a parent, or from some other consideration of health or

[1] 2 E. & B. 678.

[2] 6 E. & B. 953, in Exch. Ch.; affirming the judgment of Q. B. in Avery *v.* Bowden, 5 E. & B. 714.

decency could not marry on the day in question, he would either be liable to an action, or wholly discharged from his promise to marry. But the same good sense and convenience which would reject such a conclusion, in my judgment, requires that the contract should be construed with the conditions I attach.

For these reasons, as well as those of Wightman, J., and Erle, C. J., I think the judgment should be affirmed.

Willes, J. I am of opinion, for the reasons stated at large by Lord Campbell in the court below, that the judgment therein given against his lordship's opinion and that of Crompton, J., ought to be reversed, and judgment given for the plaintiff for the damages assessed in her favor by the jury, with costs.

This is not a case of impotence ; and I need give no opinion upon such a case.

The canon law is clear upon the point, that only impotence, permanent and incurable, such as that which results from the loss of one of the necessary organs of generation, constitutes an impediment to marriage, and not that which may be temporary or curable.

The contract in this case is stated by the plaintiff in the declaration, and admitted by the defendant in his plea, to have been in terms an unconditional one : and it is guess work, not construction, to read it as conditional. Its performance is not impossible ; and it is not enough to show, in answer to an action upon a contract, that its performance is inconvenient or may be dangerous. The delicacy of health, alleged as an excuse, is the man's misfortune, not to be visited, beyond what is inevitable, upon the woman. If either party is to have the option of breaking off the match, it ought to be the woman. The Court have no right to say what is best for her. If the man were rich or distinguished, and the woman mercenary or ambitious, she might still desire to marry him for advancement in life. I do not sympathize with such a woman, if any there be : but this is not a question of sentiment. If it were, I might put the case of a real attachment, where such an illness as that stated in the plea supervening might make the woman even more anxious to marry, in order to be the companion and the nurse, if she could not be the mistress, of her sweetheart.

The judgment for the defendant ought therefore to be reversed, and judgment given for the plaintiff, with costs.

Crowder, J. The question in this case is, Whether the plea affords any legal answer to the action : and I am of opinion that it does not.

The declaration is upon a contract to marry, and avers a

breach of that contract by not marrying in a reasonable time. The plea, as I understand it, admits a breach as alleged in the declaration, but sets up an excuse for it. And the question to be decided is, Whether that excuse is a legal answer to the action.

Now I think the substance of the excuse alleged is that, in consequence of the defendant's dangerous illness which had supervened since the promise and before the breach, it became very inexpedient and imprudent to perform the contract, and therefore the defendant broke it. It is quite impossible to construe the plea as alleging any physical impossibility to go through the ceremony of marriage, or any physical incapacity to perform the duties of marriage. Whether, if such allegations had existed, they would have afforded any answer to the action, I do not think it necessary in this case to decide : and I abstain from giving any opinion upon that point.

But I am of opinion that it is no excuse for the breach of a promise to marry, that the performance of the conjugal duties would be attended with danger to the defendant's life. Such a state of illness may make it matter of the greatest prudence on his part to break his contract, and to pay such damages as a jury may award against him for the breach. But, in my opinion, it is no legal answer to the action. I desire to refer to the arguments and reasoning of Lord Campbell in the court below as conclusive in my mind upon this view of the case. It would be idle for me to repeat them.

I think, therefore, our judgment should be for the plaintiff.

MARTIN, B. This is an appeal from the judgment of the Court of Queen's Bench, reported in the 27th Law Journal, p. 345. The action is for breach of promise to marry. The declaration is in the common form, alleging the promise to marry within a reasonable time. Among other pleas, the defendant pleaded that, before breach, he became and was and is afflicted with dangerous bodily disease, which occasioned frequent and severe bleeding from the lungs, by reason of which disease he became and was and is incapable of marriage without great danger to his life, and therefore unfit for the marriage state ; whereof the plaintiff before action (not before breach) had notice. Issue was joined upon this plea. The cause was tried before my brother Erle ; and the jury found that all the averments in the plea were proved except that as to notice. The judge directed the verdict to be entered for the defendant, giving the plaintiff leave to move to enter it for her. The other issues were found for the plaintiff, and the damages assessed contingently at £100. A rule was obtained to enter

the verdict for the plaintiff : and, after argument, the Court were equally divided ; Lord Campbell and my brother Crompton thinking the plea bad, in which case, an averment in it not being proved, the plaintiff would be entitled to have the verdict entered for her ; my brothers Wightman and Erle thought the plea, as proved, good. My brother Crompton, being the junior judge, gave way for the purpose of this appeal ; and the plaintiff's rule was discharged.

I agree with Lord Campbell and my brother Crompton, and think the plea bad.

The law of England permits an action to recover damages for the breach of a promise to marry ; although I am aware that many persons think that such an action should not be allowed. The action is not for a specific performance, a suit which I apprehend no Court in this country could entertain, but for damages for the non-performance of a contract. The plea is one in confession and avoidance : and the facts alleged in it (exclusive of the notice to the plaintiff) are said to excuse or justify the breach. The judges of the Court of Queen's Bench do not seem to have been agreed as to the exact meaning of the plea : but, to put it in the most favorable view for the defendant, it may be assumed that the promise to marry involves a promise to consummate the marriage, and that the incapacity and danger to life mentioned in the plea has been caused by an inevitable misfortune without any act or conduct of the plaintiff conducing to it.

The general rule upon the subject is, that, when a person by his own contract creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his conduct. Paradine *v.* Jane,[1] cited and acted upon in Hadley *v.* Clarke[2] and Atkinson *v.* Ritchie.[3] See also Com. Dig., Action upon the Case upon Assumpsit (G). And I know of no authority, except it be Lawrence *v.* Twentiman,[4] having any tendency to shake it, or to show that such a state of facts as alleged in the plea is an answer to an action for pecuniary damages for the breach of contract to marry. I think it very much better to adhere to the rule than to create an arbitrary exception for which, no doubt, plausible reasons may be given. To admit exceptions of this kind utterly destroys the certainty of the law, and in my opinion is inconvenient. But, in the present case, what the defendant promised to do was to marry the plaintiff. This he could have done ;

[1] Aleyn, 26.
[2] 8 T. R. 259.
[3] 10 East, 530.
[4] 1 Rol. Abr. 450, pl. 10.

and it is quite consistent with the averment in the plea that the incapacity and danger to life may have been caused by the defendant's own acts or conduct: and a case will readily suggest itself where, after a promise to marry, an incapacity to consummate marriage and danger to life in attempting to do so might arise, in which it would seem absurd to suppose that damages could not be recovered. The supposed subject of the plea would be the grossest aggravation of the cause of action. As to Lawrence *v.* Twentiman,[1] except it be explicable in the manner suggested by Lord Campbell in his judgment in this case, viz., that time was not of the essence of the contract, or that the law relating to holding intercourse with persons affected by the plague (see stat. 1 Ja. 1, ch. 31) made the performance of the contract illegal, I cannot agree with it. It is, no doubt, referred to in several books as authority: but, unless explained as above, it seems contrary to the rule of law. The placitum is to the effect that a man had contracted to build a house before a certain day, but was excused because the plague had broken out, and continued to the day in the neighborhood: but, it is added, he must build it afterward. Unless the contract really was to build the house within a reasonable time, or the statute of James made the building illegal because of the existence of the plague in the neighborhood (in which case the decision was right), the case cannot be sustained. How is it possible to maintain that there could be any obligation to build it afterward? The builder never contracted to do so; and the common law could not impose such a contract upon him. See Shepherd's Touchstone, by Preston, p. 174, and Barber *v.* Hodgson,[2] which seems to the contrary.

It must be taken that the law deems a contract to marry to be one of pecuniary value: and, assuming that it could not reasonably be expected, under the circumstances stated in the plea, that the defendant should marry the plaintiff, I can see no reason why he should not compensate her for the breach of the contract. Why should the consequences of the misfortune fall upon her, and not upon the defendant? See Lord Ellenborough's judgment in Barker *v.* Hodgson,[3] and the dicta of Lord Holt in Thornborow *v.* Whitacre.[4] For these reasons I think the judgment ought to be reversed.

WILLIAMS, J. I am of opinion that the plea is bad, and that the plaintiff is therefore entitled to judgment.

It appears to me to be a plea in confession and avoidance; that is to say, the defendant alleges that he is justified in not

[1] 1 Rol. Abr. 450, pl. 10.
[2] 3 M. & S. 267.
[3] *Ibid.*
[4] 2 Ld. Raym. 1164.

keeping his promise, because, after making it, he became incapable of marriage without great danger of his life. I am of opinion that, though this is a reason why he should not be compelled to a specific performance of the contract, and a very good reason why he should in prudence prefer paying damages for the breach of his contract to the performance of it, it is no ground for resisting the payment of such damages.

According to the general law applicable to contracts, the plea is insufficient by reason of the rule (cited in Lord Campbell's judgment) as laid down in Paradine *v.* Jane,[1] and which is established by the authorities collected in Williams's note (2) to the case of Walton *v.* Waterhouse.[2]

But it is alleged that a contract to marry stands on a peculiar footing, and is subject to implied conditions peculiar to itself. And the authorities certainly afford ground for contending that, if the parties in this case had been reversed, and the present defendant were suing the present plaintiff on the contract, she might have set up his bodily inaptitude as a ground for refusing to perform her contract, just as he might have pleaded her corporal inaptitude, or want of chastity, which had supervened or had been discovered since the making of the contract. But there is no authority, that I am aware of, or any good reason, for allowing the one party to set up his or her corporal infirmity or unfitness for marriage, or his or her impurity, in answer to the requisition of the other, who may nevertheless wish for and insist upon the performance. A woman would not be allowed to plead her own want of chastity if she were sued for a breach of promise of marriage, notwithstanding the man might well set it up as an answer if she were to seek to enforce the contract.

But it has been argued that this is not a plea in confession and avoidance, but a kind of circuitous traverse of a reasonable time having elapsed, or a plea merely of matter which suspends the performance of the contract. As to this, I think it enough to say that in this respect I entirely agree in the view which Lord Campbell and my brother Crompton have taken in their judgments.

I will add that this question, though a nice and curious one, is not likely in my opinion to be of any great practical importance. Surely the cases must be very rare where a woman, if informed that the man to whom she has been affianced is in such a state of health as the defendant is alleged to have been, and is requested to excuse on that account the completion of the marriage contract, would insist on the performance of it, or

[1] Aleyn, 26.

[2] 2 Wms. Saund. 422.

where, if she was so ill advised as to bring an action for a breach of it, a jury could be found who would, under such circumstances, give her more than nominal damages. But, in the present case, the defendant broke off the marriage without informing the plaintiff that he had such a ground for wishing to be excused from becoming her husband.

For these reasons I think the judgment of the Queen's Bench ought to be reversed.

POLLOCK, C.B. After the discussion which this case has undergone, I do not think it necessary to say anything upon the formal or technical parts of the case; but I shall proceed at once to the question as to which a difference of opinion prevails among the members of this Court, and of the court below: and that is, What is the real meaning of a contract to marry within a reasonable time, which is the contract stated in the declaration?

Some learned judges think it is of the same character as any other contract, and that no terms or conditions can be implied by the law: and that, if it be not performed in the terms expressed, the party failing to perform it must pay damages for the breach of it. Other learned judges think that there are implied conditions or exceptions, and that the matter stated in the plea is one of them; and therefore that the defendant cannot be called upon to pay damages for the non-performance of the contract alleged in the declaration under the circumstances which appear on the whole record.

Now it must be conceded on all hands that there are contracts to which the law implies exceptions and conditions which are not expressed. All contracts for personal services which can be performed only during the lifetime of the party contracting are subject to the implied condition that he shall be alive to perform them: and, should he die, his executor is not liable to an action for the breach of contract occasioned by his death. So a contract by an author to write a book within a reasonable time, or by a painter to paint a picture within a reasonable time, would in my judgment be deemed subject to the condition that, if the author became insane or the painter paralytic, and so incapable of performing the contract by the act of God, he would not be liable personally in damages any more than his executors would be if he had been prevented by death. In truth, the reasonable time has not arrived, if the party contracting to perform the act has been deprived by illness of the means of performing it: but I should decline to put my judgment on that ground; though in this case, and on this record, I think it would be quite sufficient. I prefer putting it

on the ground that there is an implied exception, including the state of facts alleged in the plea, and found by the jury to be true.

In the case of the ordinary contract to marry, such as it is presented to the Court by evidence in actions of this sort, I think no one can doubt that the continuance of life is an implied condition. The question then is: Is the continuance of health, of such a state of health as makes it not improper to marry, another condition? I am of opinion that it is. There are conditions to be implied (I think) on both sides in such an agreement. I think every one would admit that it is a condition on the part of the female that she should continue chaste, and perhaps, more generally (though this is not so clear), that her conduct should not be such as to make a marriage with her improper. I think the test that may be safely applied to ascertain whether any such condition is implied or not is to consider what would be the case if a man were, after such a promise to marry, to lose by accident or disease the capacity to contract matrimony by becoming impotent. To such a case the decisions about impossibility do not, I think, apply. By the act of God the contract has become void. The man may go through the ceremony of marriage; but he cannot marry: the ceremony would not be binding: it would operate nothing: and the contract to marry is broken by the calamity of his becoming impotent.

It has been suggested that in such a case the woman may be contented with the society of the man, and that the choice ought to rest with her; and that, if she be willing to marry, he must marry or pay damages. I am of opinion that such is not the law. I think, if the man can say with truth "By the visitation of Providence I am not capable of marriage," he cannot be called upon to marry: and I think this is an implied condition in all agreements to marry. I think that a view of the law which puts a contract of marriage on the same footing as a bargain for a horse, or a bale of goods, is not in accordance with the general feelings of mankind, and is supported by no authority.

And I think the judgment of the court below ought to be affirmed.

Judgment reversed.[1]

[1] Cockburn, C.J., who had heard the argument in the Court of Exchequer Chamber, had, since then, become Chief Justice of the Court of Queen's Bench, against the judgment of which Court this appeal was brought.

THE SUPERINTENDENT AND TRUSTEES OF PUBLIC SCHOOLS OF THE CITY OF TRENTON *v.* IRA BENNETT AND AARON CARLISLE.

IN THE SUPREME COURT OF NEW JERSEY, JUNE TERM, 1859.

[*Reported in* 27 *New Jersey Law Reports* 513.]

THIS was an action of *assumpsit*, brought against Bennett and Carlisle, as guarantors for Evernham and Hill. In the fall of 1856 the plaintiffs made a contract with Evernham and Hill to build and complete a school-house, and find all materials therefor, according to specifications annexed to the contract; the building to be located on a lot owned by the plaintiffs, and designated in the contract. Bennett and Carlisle guaranteed the fulfilment of this contract on the part of Evernham and Hill. When the building was partially erected it was blown down by a gale of wind. The contractors rebuilt it, and when nearly completed, the house again fell down, and the contractors, alleging that the second fall was occasioned by latent defects in the soil, refused to rebuild it.

The contract price was $2610, of which $2200 was to be paid in instalments, as follows: $300 when the first floor of joists was on; $300 when the second floor of joists was on; $1000 when the building was enclosed; $400 when the plastering was done; $200 when the building was completed, except the rough-casting, and the balance to be paid when the whole was finished. When the building fell down the second time instalments to the amount of $1600 had been paid to the contractors. To recover the damages which the plaintiffs had sustained by reason of the non-fulfilment of the contract on the part of the contractors, this suit was brought against the guarantors.

The cause was tried at the Mercer Circuit, at April Term, 1858. On the trial the plaintiffs, having proved the amount paid to the contractors, and that they had failed to complete the building according to contract, rested their case.

The defendants then opened their case, and offered to prove that the plaintiffs procured the plan and specifications for the building to be made under the advice of builders or architects employed by them, and purchased the lot of land whereon the building was to be erected, and designated the particular location of the building, and the precise elevation of said building and its first floor, and that the contractors and defendants were not consulted about either the plan, specifications, lot pur-

chased, particular location, or elevation ; that the plaintiffs advertised for proposals to erect said building according to said plan and specifications, and that the contractors were the lowest bidders therefor, and proceeded to erect said building, and did erect the same in strict accordance with said specifications, and that as each portion of the building was completed, the completion of which was a condition precedent to the payment of an instalment of the contract price, such completion was reported to the plaintiffs by the plaintiffs' agents ; that all the work of the said contractors was done, in strict accordance with the plans and specifications, in a workmanlike manner and of proper materials, and that they exercised all proper care over said building while in course of erection ; that after the second floor of joists were laid on said building, and the instalment due therefor was paid, a violent gale of wind arose suddenly, without any of the usual premonitory signs of a storm, and prostrated the said building ; that the said contractors thereupon again proceeded to, and did erect said building of proper materials, and in a good workmanlike manner, in strict accordance with the said plans and specifications, until said building was enclosed, and the plastering nearly completed ; that as each portion of said building was so again completed, its completion was reported to the plaintiffs by their agents, and the instalment of $1000 was paid ; that when the building was thus enclosed, and nearly plastered, it fell, solely on account of the soil on which it stood having become soft and miry, and unable to support the weight of said building ; that at the time the foundation walls were laid, the said soil appeared to be in all respects suitable for the support of such building ; that said soil was at that time so hard as to be penetrated with difficulty by the pick-axe, and that its defects were latent ; that said soil became soft and miry in the spring of the year, either by reason of the rising of the springs, or from other natural causes wholly beyond the control of said contractors ; that by the uniform custom of the trade, the phrase " with a cellar under the building to be eight feet deep," is a trade phrase, meaning that the height of the foundation wall is to be of the depth of the cellar, measuring from the bottom of the cellar to the joists of the first floor.

The counsel of the plaintiffs moved to overrule said evidence so offered by said defendants, upon the ground that if all the facts offered to be proved were proved, they would constitute no legal defence to said action. The Court overruled said defence, and, under the direction of the Court, a verdict was taken for the plaintiffs for the amount of the instalments paid the con-

tractors, with interest, subject to the opinion of the Court ; and to the end that it might be decided whether the said verdict was properly rendered, it was directed that the case be certified to the Supreme Court, for its opinion upon the following points.

1. Were all or either of the facts offered to be proved on the part of the defendants competent evidence ? If proved, would they constitute a valid legal defence to the action of said plaintiffs ?

2. Should the damage occasioned by the destruction of the part of said building first erected, by the aforesaid gale of wind, be borne by the plaintiffs or the defendants ?

Argued at February Term, 1859, before the Chief Justice, and Ogden, Vredenburgh, and Whelpley, JJ.

Gummere and *W. L. Dayton* for defendants.

E. W. Scudder and *Dutcher* for plaintiffs.

The opinion of the Court was delivered by

WHELPLEY, J. This case presents the naked question, whether, where a builder has agreed, by a contract under seal, with the owner of a lot of land " to build, erect, and complete a building upon the lot for a certain entire price, but payable in arbitrary instalments, fixed without regard to the value of the work done, and the house before its completion falls down, solely by reason of a latent defect in the soil, and not on account of faulty construction, the loss falls upon the builder or the owner of the land."

The case comes before the Court, upon a certificate from the Mercer Circuit, for the advisory opinion of this Court.

The covenant of Evernham and Hill was to build, erect, and complete the school-house upon the lot in question for the sum of $2610 ; the whole price was to be paid for the whole building ; the division of that sum into instalments, payable at certain stages of the work, was not intended to sever the entirety of the contract, and make the payment of the instalments payment for such parts of the work as might be done when they were payable ; this division was made not to apportion the price to the different parts of the work, but to suit the wants of the contractor, and aid him in the completion of the work ; the consideration of the covenant to complete the building was the whole price, and not the mere balance that might remain after the payment of the instalments ; it cannot be pretended that the contractor, after payment of a part of the instalments, might refuse to go on and complete the building, and yet retain that part of the price he had received. Haslack *v.* Mayers, 2 Dutcher, 284.

No rule of law is more firmly established by a long train of

decisions than this, that where a party, by his own contract, creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract ; therefore if a lessee covenant to repair a house, though it be burned by lightning, or thrown down by enemies, yet he is bound to repair it. Paradine *v.* Jayne, Alleyn, 26 ; Walton *v.* Waterhouse, 2 Wm. Saunders, 422*a*, note 2 ; Brecknock Company *v.* Pritchard, 6 Term Rep. 750. This case was an action upon a covenant to build a bridge, and keep it in repair ; the defendant pleaded that the bridge was carried away by the act of God, by a great and extraordinary flood, although well built and in good repair. The plea was held bad on demurrer.

To the same effect are Bullock *v.* Dommit, 6 Term. Rep. 650 ; Phillips *v.* Stevens, 16 Mass. 238 ; Dyer, 33*a*. And there is no relief in equity. Gates *v.* Green, 4 Paige, 355 ; Holtzapffell *v.* Baker, 18 Ves. 115. Walworth, C., in Gates *v.* Green, in denying relief in equity against a covenant to pay rent after the destruction of the demised premises, admits the rule to be against natural law, and not to be found in the law of other countries where the civil law prevails, yet says it is firmly established, notwithstanding the struggles of some of the early English chancellors against it.

In Beebe *v.* Johnson, 19 Wend. 500, it was held, by Nelson, C.J., delivering the opinion of the Court, that the defendant was not excused from performing his covenant to perfect, in England, a patent granted in this country, so as to insure to the plaintiff the exclusive right of vending the patented article in the Canadas, because the power of granting such an exclusive privilege appertained not to the mother country, but to the provinces, and was never granted, except to subjects of Great Britain and residents of the provinces ; and the plaintiff and defendant were both American citizens.

The Court said, if the covenant be within the range of possibility, however absurd or improbable the idea of execution may be, it will be upheld, as where one covenants it shall rain to-morrow, or that the pope shall be at Westminster on a certain day. To bring the case within the rule of dispensation, it must appear that the thing to be done cannot by any means be accomplished, for if it be only improbable, or out of the power of the obligor, it is not deemed in law impossible. 3 Comyn's Dig. 93. If a party enter into an absolute contract, without any qualification or exception, and receives from the party with whom he contracts the consideration of such engagement, he must abide by the contract, and either do the act or pay the

damages ; his liability arises from his own direct and positive undertaking.

In Lord *v.* Wheeler, 1 Gray, 282, where a workman had agreed to repair a building for an entire sum, and after the owner had moved in, it was burned up before the repairs were completed, it was held, that where one person agrees to expend labor upon a specific subject, the property of another, as to shoe his horse, or slate his dwelling house, if the horse dies, or the dwelling-house is destroyed by fire before the work is done, the performance of the contract becomes impossible, and with the principal perishes the incident. The case was clearly distinguished from the ordinary contract of one to erect a building upon the lands of another, performing the labor and supplying the materials therefor ; where, if before the building is completed or accepted, it is destroyed by fire or other casualty, the loss falls upon the builder, he must rebuild. The thing may be done, and he has contracted to do it. Nichols *v.* Adams, 19 Pick. 275 ; Brumby *v.* Smith, 3 Ala. 123 ; 2 Parsons on Con. 184 ; 1 Chit. on Con. 568.

No matter how harsh and apparently unjust in its operation the rule may occasionally be, it cannot be denied that it has its foundations in good sense and inflexible honesty. He that agrees to do an act should do it, unless absolutely impossible. He should provide against contingencies in his contract. Where one of two innocent persons must sustain a loss, the law casts it upon him who has agreed to sustain it, or rather the law leaves it where the agreement of the parties has put it ; the law will not insert, for the benefit of one of the parties, by construction, an exception which the parties have not, either by design or neglect, inserted in their engagement. If a party, for a sufficient consideration, agrees to erect and complete a building upon a particular spot, and find all the materials, and do all the labor, he must erect and complete it, because he has agreed so to do. No matter what the expense, he must provide such a substruction as will sustain the building upon that spot, until it is complete and delivered to the owner. If he agrees to erect a house upon a spot where it cannot be done without driving piles, he must drive them, because he has agreed to do everything necessary to erect and complete the building. If the difficulties are apparent on the surface, he must overcome them. If they are not, but become apparent by excavation or the sinking of the building, the rule is the same. He must overcome them, and erect the building, simply because he has agreed to do so—to do everything necessary for that purpose.

The cases make no distinction between accidents that could

be foreseen when the contract was entered into, and those that could not have been foreseen. Between accidents by the fault of the contractor, and those where he is without fault, they all rest upon the simple principle. Such is the agreement, clear and unqualified, and it must be performed, no matter what the cost, if performance be not absolutely impossible.

The case of a bailment of an article—*locatio operis faciendi*—is not analogous to the case before the Court ; there, if the article entrusted to the workman is lost without his fault, the owner sustains the loss ; not because he is the owner, but because the contract of bailment is well defined by the law ; there is no express agreement to return the article to the owner in a finished state ; but the agreement is an implied agreement, a duty imposed by the law upon a bailee, because the chattel has been bailed to him, to use his best endeavors to protect the bailment from injury. Parsons states the obligation of the workman to be, to do the work in a proper manner, to employ the materials furnished in the right way. These obligations grow out of the act of bailment ; they are its legal consequences, and the law declares them to be so, not because the parties have actually so stipulated, but because they are equitable and fair ; and in the absence of express agreement such will be implied.

The case of Menetone *v.* Athawes, 3 Burr, 1592, was relied upon by defendants' counsel to show, that when the failure to perform the contract was not the fault of the contractor he can recover. It was the bailment of a ship, to be repaired while in the shipwright's dock, for the use of which the owner paid £5. The vessel was burned when the repairs were nearly completed ; the action was for these repairs. It was like the case of Lord *v.* Wheeler, before cited. The right to recover was put upon the ground that the plaintiff was not answerable for the accident, which happened without his default, unless there had been a special undertaking ; that this liability did not grow out of the law of bailments.

The cases of Trippe *v.* Armitage, 4 Mees. & Wels. 689 ; Woods *v.* Russell, 5 B. & Ald. 942 ; Clarks *v.* Spence, 4 Ad. & Ellis, 448, have no application ; they are all cases arising under the bankrupt laws, involving the question when, under the circumstances of each case, the property is an incomplete chattel in process of manufacture passed out of the bankrupt, so as not to belong to his assignees. They are inapplicable, because the rights of the parties to this suit do not turn upon the question, whether the property in an incomplete building is in the owner of the land or the builder, or whether the owner would derive a partial benefit from partial performance, but upon what was

the express contract between the parties. The question, upon whom the loss is to fall, occasioned by an inevitable accident, is not to be settled by determining what is equitable, what is right, or by the application of the maxim, *res perit domino*, or by any nice philosophical disquisitions whether the owner or the builder shall bear the loss. These considerations—this maxim—have their full application in cases where the rights of the parties have not been fixed by contract, but are to be settled by the law upon facts of the case ; where resort is to be had to an implied contract, to a legal obligation raised by the law out of the natural equities of the case, in the absence of an express agreement.

Neither the destruction of the incomplete building by a sudden tornado, nor its falling by reason of a latent softness of the soil, which rendered the foundation insecure, necessarily prevented the performance of the contract to build, erect, and complete this building for the specified price ; it can still be done, for aught that was opened to the jury as a defence, and overruled by the Court.

The whole defence was properly overruled, because it did not show the performance of the covenant impossible, or any lawful excuse for non-performance of the contract.

I am also of opinion that the damage occasioned by the destruction of the building by the gale of wind must be borne by the defendants, for the reasons before given, and that the Circuit Court be advised accordingly.

JAMES D. YERRINGTON *v.* RUFUS GREENE AND ANOTHER, ADMINISTRATORS.

IN THE SUPREME COURT OF RHODE ISLAND, SEPTEMBER TERM, 1863.

[*Reported in* 7 *Rhode Island* 589.]

ASSUMPSIT against the defendants, as administrators on the estate of William W. Keach, for the recovery of damages for the breach of a contract by which the said Keach agreed to employ the plaintiff, at a salary, for three years, in his business.

At the trial of the case, under the general issue, at the March Term of this Court, 1863, before the Chief Justice, with a jury, it was proved by letters interchanged between the plaintiff, who then resided in Boston, and the intestate, who was a manufac-

turing jeweller, in Providence, that on March 19th, 1860, the former agreed to serve the intestate, and the latter agreed to employ the plaintiff, as a clerk and salesman, having charge of the intestate's office, or place of sale, in New York, and as agent in his business in making occasional trips for him to Philadelphia for the term of three years from April 1st, 1860, or as soon thereafter as the plaintiff could obtain a release from his employment in Boston, at a salary of $1200 for the first year, of $1300 for the second year, and of $1500 for the third year; that on April 16th, 1860, the plaintiff entered into the service of the intestate, under this contract, and continued to serve him under it until April 1st, 1861, when the said Keach died; that the defendants, as administrators of said Keach, continued to employ the plaintiff at the stipulated salary, until June 16th, 1861, when, having discontinued the office in New York, and removed what goods were there to Providence, where Keach had another place of sale, they declined longer to employ the plaintiff or to pay him his salary, though from that time to the date of the writ he had been ready and willing to serve in said business, and had tendered his services in it to them, and had been unable to procure other employment; that the defendants, as administrators of Keach, wound up his business by selling the goods removed from New York, with other goods of his at Providence, and had been allowed by the Court of Probate for their services as administrators the sum of $3000.

Upon this state of facts the Chief Justice instructed the jury that the death of Keach terminated this contract of service, and that no recovery of damages could be had of the defendants, as his administrators, for their refusal to employ the plaintiff under it afterward; whereupon, the jury having returned a verdict for the defendants, the plaintiff, having duly excepted thereto, now moved for a new trial, on the ground of error in law in said instruction.

Browne for the plaintiff.

James Tillinghast for the defendants.

Ames, C.J. It is in general true that death does not absolve a man from his contracts, but that they must be performed by his personal representatives, or their non-performance compensated out of his estate. An exception to this rule, equally well established, at both the civil and common law, is, that in contracts in which performance depends upon the continued existence of a certain person or thing, a condition is implied, that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance. The implication arises in spite of the unqualified character of the prom-

issory words, because, from the nature of the contract, it is apparent that the parties contracted upon the basis of the continued existence of the particular person or chattel. The books afford many illustrations of this reasonable mode of construing contracts, *de certo corpore*, as the civil law designation of them is, in furtherance of the presumed and probable intent of the parties. The most obvious cases are the death of a party to a contract of marriage before the time fixed by it for the marriage; the death of an author or artist before the time contracted for the finishing and delivery of the book, picture, statue, or other work of art; the death of a certain slave promised to be delivered, or of a horse promised to be redelivered, before the day set for delivery or redelivery; and the death of a master or apprentice before the expiration of the term of service limited in the indentures. The bodily disability from supervening illness, as of an artist, from blindness, to paint the picture contracted for, or of a scholar to receive the instruction his father had stipulated should be received and paid for, has been held, for the like reason, to excuse each from the performance of his contract. Hall *v.* Wright, 1 Ellis. Blackb. & Ellis, 746; Stewart *v.* Loring, 5 Allen's Rep. 306. The cases in support of these and other illustrations of the exception to the general rule are set down in the defendants' brief, and it is unnecessary to repeat them. Both at the civil and the common law it is necessary that the party who would avail himself of this excuse for non-performance of the contract should be without fault in the matter upon which he relies as an excuse. The latest and most instructive case upon this subject, so far as the discussion of the principle of decision is concerned, is that of Taylor *v.* Caldwell, decided by the Queen's Bench, in May last, 8 Law Times Rep. 356. In that case it was held that the parties were discharged from a contract to let a music hall for four specified days for a series of concerts, by the accidental destruction of the hall by fire before the first day arrived. The full and lucid exposition by Blackburn, J., who delivered the opinion of the Court, of the prior cases and of the principle upon which they had been decided, leaves nothing further to be desired upon this subject.

Does the case at bar fall within the general rule or within the exception we have been considering? This must depend upon the nature of the contract, whether one requiring the continuing existence of the employer, Keach, for performance on his part, or one which could, according to its spirit and meaning, be performed by the defendants, his administrators. The contract was to employ the plaintiff as clerk and agent of the in-

testate, in his business in New York and Philadelphia ; and it seems to us undoubted that the continued existence of both parties to the contract for the whole stipulated term was the basis upon which the contract proceeded, and if called to their attention at the time of contract, must have been contemplated as such by them. The death of the plaintiff within the three years would certainly have been a legal excuse from the further performance of his contract, since it was an employment of confidence and skill, the duties of which, in the spirit of the contract, could be fulfilled by him alone. If this be the law in application to a covenant for ordinary service (Sheppard's Touchstone, 180), how much more in application to a contract for service of such confidence and skill as that of a clerk and agent for sale. On the other hand, this employment could continue no longer than the business in which the employer was engaged and the plaintiff retained. The intestate, when living, could, by the contract, have required the services of the plaintiff in no other business than that in which he had engaged him, and with no other person than himself. It would seem, then, necessarily to follow, that when the death of the employer put a stop to this business, and left no legal right over it in the administrators, except to close it up with the least loss to the estate of their decedent, they were, by the contract, bound no longer to employ the plaintiff any more than he to serve them. The act of God had taken away the master and principal—the law had revoked his agency, and stopped the business to which alone his contract bound him—and if he would serve the administrators in winding up the estate, it must be under a new contract with them, and under renewed powers granted by them. Any other result than that this contract of service was upon the implied condition, that the employer, as well as the employed, was to continue to live during the stipulated term of employment, would involve us in the strange conclusion, that the administrators might go on with the business of their intestate, in which the plaintiff must continue with powers unrevoked by the death of his principal, or that he, with new powers from them, was bound by the contract to serve them as new masters, and in a different service, and that they were bound to grant him such powers and employ him for the stipulated time in such service. The novelty of such a claim, and the contradiction of well settled principles necessary to maintain it, justify the ruling of the judge who tried the cause ; and this motion must be dismissed with costs, and judgment entered upon the verdict.

LORD CLIFFORD *v.* WATTS.

IN THE COMMON PLEAS, JUNE 7, 1870.

[*Reported in Law Reports*, 5 *Common Pleas*, 577.]

DECLARATION that the plaintiff and the defendant made and executed a deed, which was as follows :

" This indenture made the 28th of June, 1862, between Lord Clifford, of the one part, and W. J. Watts, of the other part, witnesseth that Lord Clifford, in consideration of the rent, duties, payments, covenants, and agreements hereinafter contained on the part of Watts to be paid, etc., hath demised, leased, etc., unto Watts, all and singular the mines, veins, pits, and holes of clay, as well of the description of pipe as of potter's and other clay, which now are or shall or may hereafter be found or be upon or under the lands and hereditaments of Lord Clifford hereinafter particularly mentioned, in Kingsteignton, Devon—that is to say, etc. (describing four several fields), together also with full and free liberty, etc., for Watts, etc., to enter into and upon such lands, etc., and there to open, dig, search for, gain, raise, and get up and take and carry away all such pipe, potter's, and other merchantable clays in and from the said lands, and for that purpose to dig and make pits, etc., and likewise full and free liberty of ingress, egress, etc., making such reasonable satisfaction as hereinafter is mentioned to the tenants of the said lands for such trespass or other damage as shall be occasioned thereon in consequence of the grant or liberties hereinbefore contained, to have, hold, etc., the said veins, etc., of pipe and potter's or other description of clay, with the several powers, etc., hereby granted, etc., unto Watts from the 29th of September last past for and during the term of twelve years thence next ensuing ; and to have and to hold all and every the said beds or veins of clay, as well of the description of pipe as of potter's and other qualities of clay, that shall be found and raised within the term aforesaid out of any part of the lands so authorized to be worked as aforesaid, unto Watts, etc., and as his and their own proper goods and chattels, yielding and paying therefor during the said term unto Lord Clifford in respect of all pipe and potter's clays being to be dug, got, or obtained from or under the surface of any of the lands, the sum of 2*s.* 6*d.* per ton, and so on in proportion for any greater or less quantity, and in respect of clay not answering to the description of pipe or potter's clay, but denominated seggers or aluminal

or drain clay, being to be so dug, etc., the sum of 6*d.* per ton weight, the same to be respectively paid and payable at the end of each half year accruing next after the commencement of the term hereby granted ; and further yielding and paying unto Lord Clifford at the expiration or other sooner determination of the term, the sum of £100 for every acre of land which, having been worked for clay under this demise, shall not be effectually restored for agricultural purposes, and so in proportion for any less quantity than an acre ; and Watts, etc., doth hereby covenant, etc., with Lord Clifford, that he, Watts, will pay to Lord Clifford the several dues, etc., so respectively made payable as aforesaid, free and clear of all rates, taxes, etc.; and also shall and will cause all the merchantable clays which shall be got from the lands of Lord Clifford pursuant to the above-mentioned grant or demise to be carted or removed to and deposited in the cellars or warehouses built for the reception of the same alongside the Kingsteignton Canal, from thence to be conveyed along the canal down to the port of Teignmouth, under payment of the accustomed dues and charges ; and also that Watts doth further agree to make full satisfaction to the tenants or lessees of lands into and upon whose several tenements, or parts thereof, entries shall be made for the purpose of opening clay-pits with the view of getting and removing clay therefrom, in the proportions following—that is to say, for the opening of any fresh or new pit toward the working and getting of such clay, the sum of 10*s.*, to be paid to such tenant or occupier at the time of breaking the soil toward the sinking of any such pit, and that he, Watts, shall become and be the actual occupier and renter of such close of land at and under the yearly rent of £3 per acre, and so in proportion for any less quantity than an acre, payable half yearly, if required, to such tenant or occupier ; and likewise that he, Watts, shall work and make trials for clay in, through, and underneath the said lands of Lord Clifford according to the best and most improved methods of carrying on and working clay-pits, and the usual course of proceeding in and continuing such works with effect, and shall and will form and work the said clay-pits as near together as possible, so as to cause the least possible waste or loss of clay, and shall and will get and raise and remove all the clay from the pits so to be opened as aforesaid, or that can possibly be excavated therefrom, in such perfect manner that none of such clays be left remaining therein, except so much of the commoner clays as will be necessary for the secure workings of the pits ; and also shall, when about to open any new pit or pits, carefully remove the top stratum or bed of soil as far as

the same may be found useful or serviceable for the purpose of vegetation, and cause the same to be laid aside in distinct heaps, in order to be again strewed upon the surface ; and also that he, Watts, shall, after the opening and digging the whole of the clays out of the several pits so to be worked in pursuance of the powers hereby granted cause the same in reasonable time afterward to be filled in and levelled in the usual and customary manner, so far as the gravel and other unserviceable earth or clay so thrown aside will admit of and they be enabled so to do, and on the surface of the said soils so to be used shall and will strew the earth or soil which at the opening of each such pit shall have been so thrown aside or laid in heaps pursuant to the last-mentioned covenant in that behalf ; and also that he, Watts, shall safely convey down from the surface into all or any of the clay pits so to be dug and worked, such persons as Lord Clifford or his agent shall at any time name for the purpose, and examine whether the same are worked in a fair and workmanlike manner, etc.; and shall not let, set, etc., any part of the demised premises without the consent in writing of Lord Clifford, etc. ; and also that he, Watts, his executors, etc., shall and will dig, or cause and procure to be dug and removed from the lands of Lord Clifford, his heirs, etc., in pursuance of the grant or demise hereby made, an aggregate amount of not less than 1000 tons, nor a larger quantity than 2000 tons, of pipe or potter's clay in each and every year of the term hereby granted. Then followed a covenant to keep and produce books of account, etc., a proviso for re-entry in case of default in payment of the 2*s.* 6*d.* and 6*d.* per ton in respect of all merchantable clay got from any of the lands demised, or in making satisfaction for surface damage, and a covenant for quiet enjoyment."

First breach, that the defendant had not made trials for clay according to his covenant.

Second breach, that the defendant had not dug an aggregate amount of not less than 1000 tons of pipe and potter's clay in each year of the demise that had elapsed, by reason whereof, etc.

Pleas, to the first breach, payment into Court of 40*s.* To the second breach, for defence on equitable grounds, that the defendant could not at any time during the period of the said term, dig an aggregate amount of not less than 1000 tons of pipe and potter's clay in each year of the demise, according to his covenant, because there was not at the time of the demise, nor had there been at any time since, existing upon or under the said lands upon or under which the defendant was entitled to dig by virtue of the deed, 1000 tons of pipe and potter's clay or either of them within the meaning of the covenant ; and the

performance of the said covenant by the defendant had always from the time of the making thereof been impossible ; and at the time of the making of the said covenant such impossibility was unknown to the defendant, and he had no reasonable means of knowing or ascertaining the same.

Replication to the first plea, damages ultra. Joinder of issue on the second plea, and demurrer. Joinder.

Kingdon, *Q.C.* (*Trevelyan* with him), in support of the demurrer.

Joshua Williams, *Q.C.* (*H. T. Cole*, *Q.C.*, with him), *contra*.

WILLES, J. This is an action upon a demise or grant by Lord Clifford to Watts of certain mines, pits, etc., of clay, by which demise the rent was made payable at a certain rate per ton upon the clay raised ; and the indenture contained, among others, a covenant that Watts shall work and make trials for clay under the lands in question. The first breach is founded upon that covenant, and in respect of that the defendant has paid 40*s.* into Court. The indenture also contains a covenant that Watts shall dig and raise from the land an aggregate amount of not less than 1000 tons, or more than 2000 tons, of pipe or potter's clay in each year of the term. The term granted was twelve years ; and for the pipe or potter's clay the defendant was to pay a royalty of 2*s.* 6*d.* per ton. The breach assigned on that covenant is that with which we have to deal on this occasion ; it is, that the defendant has not dug an aggregate amount of not less than 1000 tons of pipe and potter's clay in each year of the demise. The plea, the validity of which is now in question, is, that the defendant could not dig 1000 tons of clay each year according to his covenant, because there was not at the time of the demise nor since existing under the lands 1000 tons of such clay, that the performance of the covenant had always been impossible, and that such impossibility was unknown to the defendant at the time, and he had no reasonable means of knowing or ascertaining the same. To that plea there is a demurrer. It is obvious that this plea may be considered from two points of view. First, with reference to the abstract question whether a covenant to perform an impossibility is or is not valid in point of law, whether the covenanter can set up such impossibility from the beginning as an answer to a breach, or must pay damages, which, according to Mr. Preston,[1] may only be nominal. The second, and with reference to this case the most important, consideration appears to me to arise from the question whether the defendant has by this covenant contracted to perform an impossibility, or whether the true meaning of

[1] Shep. Touch. by Preston, 7th ed. 164.

the covenant, construing it by the rest of the deed, is, not that the defendant undertakes to get the stipulated quantity of clay whether it be there or not, or to pay the stipulated tonnage as if the clay had been raised, but rather, dealing with it as subsidiary to the main object of the demise, that he will raise such pipe or potter's clay as may be found under the land, at the rate and price specified. If the latter be the true construction of the covenant, it is not an independent covenant to do the thing contracted for, whether possible or not, but only a stipulation as to the rate at which that is to be done which both parties at the time contemplated. According to that construction of the covenant, the plea is a good defence to the second breach. And this is the view to which, after the best consideration I am able to bring to the case, and after having heard the very learned arguments on both sides, my opinion inclines.

The deed, without any recital, witnesses that Lord Clifford, in consideration of the rent, payments, covenants, etc., demised to Watts the mines, pits, etc., of clay under certain lands particularly described. It then proceeds to grant Watts a license to enter upon the land to dig and search for clay and to make pits, etc., with rights of way for carrying it away, etc., subject to compensation for damage. Then comes the habendum—to have, hold, etc., the said mines, etc., of pipe and potter's or other clay, with the powers thereby granted, for twelve years; and to have and to hold all and every the said beds or veins of clay that shall be found and raised within the term out of any part of the land so authorized to be worked, unto Watts, his executors, etc., unto his and their own use. So far we are dealing with the demising part of the instrument, which refers to specific lands and to specific clay which is believed by both parties to be under the lands described at the time. The whole scope of the contract is that the defendant shall take that clay. Whether the speculation would turn out to be a profitable one to the tenant or not was uncertain. So far it was natural that he should take the risk. But the question is whether we are justified in importing another element into a bargain like this —viz., a warranty by the tenant that clay shall be found, or an undertaking to pay for the quantity stipulated for whether found or not. The provision for payment follows in the reddendum, by which Watts is to pay Lord Clifford, "in respect of all pipe and potter's clay being to be dug, got, or obtained from or under the surface of any of the lands, *2s. 6d.* per ton," and *6d.* per ton for other clay, to be paid half yearly; and Watts was further to pay £100 per acre for any land which, having been worked, should not be restored to a state fit for

agricultural purposes. The indenture then proceeds in the ordinary way to the covenants on the part of the tenant. Watts covenants with Lord Clifford for payment of the rent, and that he will cause all the clay raised to be conveyed by a certain canal at rates provided for by the lease. Then follow covenants for making satisfaction for surface damage, and for payment of a kind of rent to the tenants for land required for the working of the pits; a covenant that Watts will during the continuance of the term work and make trials for clay in and under the land according to the best and most improved methods, etc., which is the subject of the first breach. Then comes a covenant that the lessee will do the least possible damage to the land, after which follows the covenant in question, and also that Watts, his executors, etc., shall dig and remove from the land demised "an aggregate amount of not less than 1000 tons, nor a larger quantity than 2000 tons, of pipe or potter's clay in each and every year of the term hereby granted." Then comes a covenant to keep accounts of all clay raised, and the remainder of the deed may be dismissed with this observation, that there is no stipulation that the tenant shall pay any sleeping rent or minimum rent, or any rent in the event of no clay being raised during the term, or not being there to be raised, nor any provision for putting an end to the term in case the clay should be exhausted. The result to my mind is, that the covenant upon which the second breach is assigned is one of a series of subsidiary covenants introduced for the purpose of carrying out the substantial object and intention of the parties—viz., that Watts should have the right during the term of working out all the clay under the land, and pay for it at the prices specified per ton; and this subsidiary covenant deals with the rate at which the clay is to be worked out. The bare statement of the provisions of the deed leads me to the conclusion that the tenant never intended to warrant that there was clay upon the land, and that neither party contemplated that he should, in the event of no clay being found there, at all events pay a minimum fixed rent during the term. It is a bare stipulation as to the rate of payment for the clay which should be raised. That appears to me to be the natural and ordinary construction of the covenant when read by the light of the context. It turned out that there was no clay of the descriptions mentioned on the land. The covenant, therefore, became inapplicable, and has not been broken.

It may be that the allegations in the plea are untrue. That, however, we are precluded from considering, for the purpose of the demurrer we must assume the plea to be true. It may

be that the defendant has taken upon himself the burden of searching for clay, and of proving at the trial that he has searched so effectually that clay must have been discovered if it had existed, and so establishing the impossibility of performance of this covenant by reason of there being no clay to be found. But for the purpose of the construction of the covenant we must assume that there was none. Cases may be conceived in which a man may undertake to do that which turns out to be impossible, and yet he may still be bound by his agreement. I am not prepared to say that there may not be cases in which a man may have contracted to do something which in the present state of scientific knowledge may be utterly impossible, and yet he may have so contracted as to warrant the possibility of its performance by means of some new discovery, or be liable in damages for the non-performance, and cannot set up by way of defence that the thing was impossible. But before we arrive at such a conclusion, we must be satisfied, if no other reasonable construction suggests itself, that the party really did intend to warrant that to be possible which was impossible. The authorities relied on for the plaintiff appear to me to be cases where a man either undertook to do a thing which was possible at the time, but which without any fault of his adversary became afterward impossible, or where he, notwithstanding the thing was impossible of performance, took upon himself to warrant that it should be possible. Barker *v.* Hodgson[1] was a case where the charterer of a ship had covenanted to send a cargo alongside at a foreign port, but in consequence of the prevalence of an infectious disorder at the port, all public intercourse was prohibited by the authorities of the place ; and yet he was held to be responsible in damages for the non-performance of his covenant. If the intercourse with the foreign port had been prohibited by the law of this country, the act would have been illegal, and the defendant would have been excused, not because he could not, but because he ought not to do it. But where the performance of the thing covenanted to be done is not made impossible by the law of this country, the case falls within the principle laid down in the leading case of Paradine *v.* Jane,[2] where the defendant, in an action for rent, sought to excuse himself by reason of his having been expelled from the premises by alien enemies, and his plea was held insufficient. The material resolution of the Court was, that " where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and hath no remedy over, there the law will excuse him ;" but " when the party by his own

[1] 3 M. & S. 267. [2] Aleyn, 26.

contract creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract; and, therefore, if the lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies, yet he ought to repair it." Where a thing becomes impossible of performance by the act of a third person, or even by the act of God, its impossibility affords no excuse for its non-performance; it is the defendant's own folly that has led him to make such a bargain without providing against the possible contingency. In the present case, if the allegations in the plea be true, there was nothing upon which the covenant could attach at the time it was entered into. Hills *v.* Sughrue[1] has no application, for another reason. There the charterer by his contract warranted that, the ship being ready to take a cargo of guano at Ichaboe, he would there provide her with a full cargo. The impossibility of obtaining a cargo there was no excuse for the non-performance of his contract. That case, therefore, falls within the second category of cases, where the defendant had warranted the possibility of doing the thing contracted for. It remains only to deal with Marquis of Bute *v.* Thompson.[2] There, by the express terms of the contract, the lessee covenanted absolutely to raise a given quantity of coal in each year, or to pay a minimum rent which should represent the minimum amount of coal agreed to be worked; and the lessee failing to raise the stipulated quantity of coal, he was held bound at all events to pay the minimum rent. The judgment of the Court is very short, and, but for the facts, might possibly be taken to bear the construction put upon it by Mr. Kingdon—viz., that the lessee was bound to perform his covenant whether there was coal to be found or not. The judgment, however, must be read with reference to the subject-matter with which the Court was dealing; and, so reading it, it is plain that the Court construed the covenant, not as a stipulation exhausting itself upon the first branch as to the raising of the coal, but as an alternative covenant to secure the lessor at all events a minimum rent during the term, whether or not coal was worked or was there to be worked. There is, however, no such covenant here. There is only a covenant to work out all the clay under the land, and this covenant was not broken by the defendant's failure to work clay if none was to be found there. I therefore think the defendant is entitled to judgment.

Judgment for the defendant.[3]

[1] 15 M. & W. 253. [2] 13 M. & W. 487.

[3] The concurring opinion of Montague Smith, J., has been omitted.—Ed.

HOWELL *v.* COUPLAND.

IN THE COURT OF APPEAL, JANUARY 18, 1876.

[*Reported in Law Reports*, 1 *Queen's Bench Division*, 258.]

APPEAL by the plaintiff from the decision of the Court of Queen's Bench making absolute a rule to enter the verdict for the defendant.[1]

The plaintiff is a potato merchant at Holbeach, Lincolnshire, and the defendant a farmer at Whaplode, in the same county.

In 1872 the defendant, at the proper season, and in the due course of husbandry, appropriated between 80 and 90 acres of land for the growth of potatoes: 68 acres at Whaplode, and about 20 in Holbeach.

In March of the same year the plaintiff and the defendant entered into the following contract: "A memorandum of agreement, made this day of , 1872, between Robert Coupland, of Whaplode, and John Howell, of Holbeach, whereby Robert Coupland agrees to sell, and the said John Howell agrees to purchase, 200 tons of regent potatoes grown on land belonging to the said Robert Coupland in Whaplode, at and after the rate of £3 10*s.* 6*d.* per ton, to be riddled on 1⅝-inch riddle, and delivered at Holbeach railway station, good and marketable ware, during the months of September or October, as the said John Howell may direct, and, under his direction, the purchaser to find riddles. It is further agreed between the said Robert Coupland and the said John Howell, that the said potatoes shall be paid for when and as they are taken away."

At the time of making the contract, out of the 68 acres in Whaplode 25 were actually sown with potatoes, and the remaining 43 acres were ready for sowing. The 43 acres were afterward sown in due course, and the whole 68 acres together were amply sufficient, in an ordinary season and in the ordinary course of cultivation, to produce a much larger quantity than 200 tons, the land producing, on an average, 7 tons to the acre.

In July and August, without any default on the part of defendant, a disease which no skill or care on the part of the defendant could have prevented attacked the crop and caused it to fail; and when the time for taking it up arrived, the whole marketable produce of the crop of the lands of the defendant, both in Whaplode and Holbeach together, amounted to no

[1] Law Rep. 9 Q. B. 462.

more than 79 tons 8 cwt., and this quantity the defendant delivered to the plaintiff. The rest of the crop had perished from the disease.

If the defendant had had other land to plant with potatoes at the time when the disease was discovered, which in fact he had not, it would have been too late to sow it.

The present action was brought to recover damages for the non-delivery of the residue of the 200 tons, and the verdict at the trial was entered for £432 5*s*., leave being reserved to move to enter the verdict for the defendant, on the ground that he was not liable to deliver the ungrown potatoes.

A rule having been obtained accordingly, it was made absolute by the Court of Queen's Bench on May 22d, 1874.[1]

D. Seymour, *Q.C.*, and *Waddy*, *Q.C.*, in support of the motion.

Herschell, *Q.C.*, and *Beasley*, *contra*.

Lord Coleridge, C.J. I am of opinion that the judgment ought to be affirmed. [The Lord Chief Justice read the contract and facts.] The Court of Queen's Bench held that, under these circumstances, the principle of Taylor *v.* Caldwell[2] and Appleby *v.* Myers[3] applied, and the defendant was excused from the performance of his contract. The true ground, as it seems to me, on which the contract should be interpreted, and which is the ground on which, I believe, the Court of Queen's Bench proceeded, is that by the simple and obvious construction of the agreement both parties understood and agreed, that there should be a condition implied that before the time for the performance of the contract the potatoes should be, or should have been, in existence, and should still be existing when the time came for the performance. They had been in existence, and had been destroyed by causes over which the defendant, the contractor, had no control, and it became impossible for him to perform his contract ; and, according to the condition which the parties had understood should be in the contract, he was excused from the performance. It was not an absolute contract of delivery under all circumstances, but a contract to deliver so many potatoes, of a particular kind, grown on a specific place, if deliverable from that place. On the facts the condition did arise and the performance was excused. I am, therefore, of opinion that the judgment of the Queen's Bench should be affirmed.

James, L.J. I think the case was rightly considered in the Court below to turn upon the construction of the contract. Is it a contract for a certain quantity of potatoes of a particular

[1] Law Rep. 9 Q. B. 462.

[2] 3 B. & S. 826 ; 32 L. J. (Q. B.) 164.

[3] Law Rep. 2 C. P. 651.

sort, with a warranty that they shall be supplied, or is it a contract to deliver 200 tons of potatoes out of a specific crop? I am of opinion it is the latter; and if so, the principle of the cases relied on applies, and the defendant is excused by reason of his being prevented by causes for which he is not answerable.

MELLISH, L.J. I am of the same opinion. The words of the contract are clear; the defendant "agrees to sell 200 tons of regent potatoes grown on land belonging to him in Whaplode" —that is, potatoes which shall be grown in Whaplode. They are to be grown there, and delivered to the plaintiff provided they are grown there. Is not that a condition, so that, according to the cases on which the Court of Queen's Bench acted, if the thing perishes before the time for performance the vendor is excused from performance by the delivery of the thing contracted for? No doubt there is a distinction in the present case, that the potatoes, the things contracted for, were not in existence at the time the contract was entered into. But can that make any real difference in principle? Suppose the potatoes had been full grown at the time of the contract, and afterward the disease had come and destroyed them, according to the authorities it is clear that the performance would have been excused; and I cannot think it makes any difference that the potatoes were not then in existence. This is not like the case of a contract to deliver so many goods of a particular kind, where no specific goods are to be sold. Here there was an agreement to sell and buy 200 tons out of a crop to be grown on specific land, so that it is an agreement to sell what will be and may be called specific things; therefore neither party is liable if the performance becomes impossible. The language of this contract is much easier to imply a condition from than in most former cases where it has been held to be implied.

BAGGALLAY, J.A. I at first doubted whether the contract excluded the possibility of the defendant being able to perform his contract by delivering potatoes grown on other land; but on consideration it is clear the contract is confined to particular land; and the statement in the case is that 68 acres, the amount actually sown with potatoes, was a due proportion to enable the defendant to perform his contract in an ordinary season.

CLEASBY, B. I am of the same opinion. I put my decision, not so much on the ground that the defendant was excused by the act of God rendering the performance impossible, as upon the terms of the contract itself. This is not like a contract where the parties have agreed to deliver a cargo of grain at Odessa or any other port by a given time, in which case the parties are bound by the contract, although its performance has

become impossible by *vis major*. Here there was not an absolute contract to deliver 200 tons of potatoes in September and October, but 200 tons of potatoes grown on particular land. Not 200 tons of potatoes simply, but 200 tons off particular land. The crop on this particular land has failed, and there is nothing to which the promise can apply. If the crop had existed at the time of the contract, and had afterward failed, there can be no doubt that the principle of the decided cases would apply and the defendant would be excused ; and I cannot see any difference in principle from the fact that the crop had not been sown at the date of the contract.

Appeal dismissed.

THOMAS T. STEWART, APPELLANT, *v.* BENJAMIN S. STONE, RESPONDENT.

IN THE COURT OF APPEALS, OCTOBER 6, 1891.

[*Reported in* 127 *New York Reports* 500.]

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made April 17th, 1888, which affirmed a judgment in favor of defendant, entered upon the report of a referee.

The plaintiff and his assignors were patrons of the defendant's factory, where they and others delivered milk to be manufactured into cheese and butter, marketed and the proceeds deposited by him for them respectively at a stipulated compensation. This was done by the defendant up to October 28th, 1883, when the factory was destroyed by fire, and a quantity of milk, butter, and cheese thereby lost. Several of the patrons suffering such loss assigned their asserted claims against the defendant to the plaintiff, who brought this action, and in his complaint alleged that the destruction and loss by the fire was occasioned by the negligence of the defendant or his agents and servants.

The referee found that such negligence was not established, and directed judgment for the defendant.

Further facts appear in the opinion.

J. W. Shea for appellant.

W. A. Poucher and *C. C. Brown* for respondent.

BRADLEY, J. The plaintiff and his assignors agreed to deliver their milk at the defendant's factory for that purpose, and he undertook, for a stipulated compensation, to there manufac-

ture from it butter and cheese, sell such products, and distribute between them the proceeds in the manner provided for by the agreement.

It is also urged that the defendant, having undertaken to manufacture the butter and cheese from the milk furnished him at the factory by the plaintiff and his assignors, market the product and pay to them the proceeds, is liable for breach of his contract irrespective of the question of negligence.[1] This proposition, in view of the issue made by the pleadings, cannot now, for the predication of error, be treated as in the case, although to sustain a judgment issues may be deemed so broadened as to conform the pleadings to the facts proved when it can be done without violation of any rule of law. But upon the basis of an alleged breach of contract the plaintiff's action would not be supported upon the evidence and facts as found by the referee.

It is true that where an absolute executory contract is made, the contractor is not excused by inability to execute it caused by unforeseen accident or misfortune, but must perform or pay damages unless he has protected himself against such contingency by stipulation in the contract. Harmony *v.* Bingham, 12 N. Y. 99; Tompkins *v.* Dudley, 25 N. Y. 272; Wheeler *v.* Conn. Mut. L. Ins. Co., 82 N. Y. 543. But there may be in the nature of a contract an implied condition by which he will be relieved from such unqualified obligation, and when, in such case, without his fault, performance is rendered impossible, it may be excused. That is so when it inherently appears by it to have been known to the parties to the contract, and contemplated by them when it was made, that its fulfilment would be dependent upon the continuance or existence at the time for performance, of certain things or conditions essential to its execution. Then in the event they cease, before default, to exist or continue, and thereby performance becomes impossible without his fault, the contractor is, by force of the implied condition to which his contract is subject, relieved from liability for the consequences of his failure to perform. People *v.* Bartlett, 3 Hill, 570; Dexter *v.* Norton, 47 N. Y. 62; Booth *v.* S. D. R. Mill Co., 60 N. Y. 491; Taylor *v.* Caldwell, 3 B. & S. 826.

By the contract now under consideration, the cheese and butter were to be manufactured at this factory, and to be made from the milk furnished by the patrons, of whom the plaintiff and his assignors were members. The existence of that particular factory was terminated by its destruction, and the loss

[1] Only so much of the opinion is given as relates to this question.—ED.

with it of the manufactured product and of the milk then remaining there unconverted into cheese and butter rendered it impossible for the defendant to further proceed with the performance of his contract in respect to those articles of material and product. And as the nature of the agreement was such that it must be deemed to have been contemplated by the parties to it, that the articles to be manufactured should be made only from the materials furnished by the patrons and at the factory referred to, there was necessarily an implied condition so qualifying the defendant's undertaking, as to relieve him from performance rendered impossible without his fault, and from the consequences of his inability thus occasioned to fulfil his contract in respect to the subject of the bailment which was destroyed by the fire.

There was no error to the prejudice of the plaintiff in any of the rulings of the referee to which exceptions were taken in the reception or rejection of evidence.

These views lead to the conclusion that the judgment should be affirmed.

All concur, except FOLLETT, C.J., not sitting.

Judgment affirmed.

G. W. ANDERSON *v.* L. L. MAY.

IN THE SUPREME COURT OF MINNESOTA, JUNE 27, 1892.

[*Reported in* 50 *Minnesota* 280.]

APPEAL by defendant, L. L. May, from an order of the District Court of Ramsey County, Kelly, J., made January 2d, 1892, refusing a new trial.

The plaintiff, G. W. Anderson, was in the business of raising and selling seeds at Red Wing, Minn. On March 7th, 1890, May, a seedsman at St. Paul, ordered 591 bushels of beans of different varieties, to be raised by Anderson and delivered to May at St. Paul by November 15th, 1890. After some correspondence as to price and seed and time of delivery, the order was accepted. Anderson delivered but 152 bushels and brought this action to recover $287.66, the price, less $63.14, the value of seed he had received from May.

The defendant answered setting up the contract and plaintiff's failure to perform, and claimed $1100 damages. At the trial plaintiff contended that he was excused from performance on the ground that an early and unusual frost in the month of

Frost came & destroyed plaintiffs crop. act of God made performance impossible

September had destroyed most of his crop, and for that reason he was unable to furnish the full amount of beans ordered. He contended that he was thus without fault on his part prevented from performing, by act of God. The jury gave plaintiff a verdict for $234.80. Defendant moved for a new trial, and being denied, appealed.

H. J. Horn and *E. A. Horn* for appellant.

J. C. & W. H. Michael for respondent.

GILFILLAN, C.J. The defendant having alleged as a counterclaim a contract in June, 1890, between him and plaintiff, whereby the latter agreed to sell and deliver to the former, on or before November 15th, certain quantities of specified kinds of beans, and that he failed so to do except as to a part thereof, the plaintiff, in his reply, alleged in substance that the contract was to deliver the beans from the crop that he should raise that year from his market gardening farm near Red Wing. Upon the trial the contract was proved by letters passing between the parties. From these it fairly appears that the beans to be delivered were to be grown by plaintiff, though it cannot be gathered from them that he was to grow the beans on any particular land. They contain no restriction in that respect. There can be no question that, if grown by him, and of the kinds and quality specified, defendant would have been obliged to accept the beans, though not grown on any land previously cultivated by plaintiff. The contract, therefore, was, in effect, to raise and sell and deliver the quantities, kinds, and quality of beans specified—a contract in its nature possible of performance.

Def. As an excuse for not delivering the entire quantity contracted for, the plaintiff relies on proof of the fact that an early unexpected frost destroyed or injured his crop to such extent that he was unable to deliver the entire quantity.

What, in the way of subsequently arising impossibility for the party to perform, will suffice as excuse for non-performance of a contract, is well settled in the decisions; the only apparent difference in them arising from the application of the rules to particular circumstances. The general rule is as well stated as anywhere in 2 Chit. Cont. 1074, thus: "Where the contract is to do a thing which is possible in itself, or where it is conditioned on any event which happens, the promisor will be liable for a breach thereof, notwithstanding it was beyond his power to perform it; for it was his own fault to run the risk of undertaking to perform an impossibility, when he might have provided against it by his contract. And therefore, in such cases, the performance is not excused by the occurrence of an inevitable accident, or other contingency, although it was not

plaintiff should stipulate in his contract that he would be liable in case of frost

It was no fault of the def. that he plaintiff agreed to perform an impossibility.

foreseen by, or within the control of the party." An application of this rule is furnished by Cowley *v.* Davidson, 13 Minn. 92 (Gil. 86). What is sometimes called an "exception to the rule" is where the contract is implied to be made on the assumed continued existence of a particular person or thing, and the person or thing ceases to exist, as, where it is for personal service, and the person dies, or it is for repairs upon a particular ship or building, and the ship or building is destroyed. An agreement to sell and deliver at a future time a specific chattel existing when the agreement is made would come under this exception. The exception was extended further than in any other case we have found in Howell *v.* Coupland, L. R. 9 Q. B. 462. That was a contract to sell and deliver a certain quantity from a crop to be raised on a particular piece of land, and the entire crop was destroyed by blight. The Court held the contract to be to deliver part of a specific thing, to wit, of the crop to be grown on a given piece of land, and held it to come within the rule that, where the obligation depends on the assumed existence of a specific thing, performance is excused by the destruction of the thing without the parties' fault. Without intimating whether we would follow that decision in a similar case, we will say that the case is unlike this, in that in this case the plaintiff was not limited or restricted to any particular land. It was not an undertaking to sell and deliver part of a specific crop, but a general undertaking to raise, sell, and deliver the specified quantity of beans. We have been cited to and found no case holding that, where one agrees generally to produce, by manufacture or otherwise, a particular thing, performance being possible in the nature of things, he may be excused from performance by the destruction, before completion or delivery, of the thing, from whatever cause, except the act of the other party. Applications of the general rule, where the thing agreed to be produced was, before completion, destroyed without the party's fault, are furnished in Adams *v.* Nichols, 19 Pick. 275, 279; School Dist. *v.* Dauchy, 25 Conn. 530; and Trustees *v.* Bennett, 27 N. J. Law, 513, approved and followed in Stees *v.* Leonard, 20 Minn. 494 (Gil. 448). Where such causes may intervene to prevent a party performing, he should guard against them in his contract.

Order reversed.

WILLIAM SUMMERS *et al. v.* HIBBARD, SPENCER, BARTLETT & CO.

IN THE SUPREME COURT OF ILLINOIS, OCTOBER 29, 1894.

[*Reported in* 153 *Illinois* 102.]

APPEAL from the Appellate Court for the First District; heard in that Court on appeal from the Superior Court of Cook County; the Hon. Theodore Brentano, J., presiding.

Summers Bros. & Co., appellants, were manufacturers of sheet iron at Struthers, O., and Hibbard, Spencer, Bartlett & Co., appellees, were jobbers in shelf hardware and light iron at Chicago. On March 1st, 1889, appellees mailed to appellants a letter which was as follows:

"*Summers Bros. & Co., Struthers, Ohio:*

"GENTLEMEN: We are thinking of buying 5000 to 10,000 bundles common sheet iron, for delivery, in equal quantities, in the months of April, May, June, July, and August, and would be pleased to have your best price on same. We shall want all numbers from 16 to 27, but at least three fourths of the lot 26 and 27. Hoping to hear from you soon with a low price, yours truly,

"HIBBARD, SPENCER, BARTLETT & CO."

Appellants answered said letter as follows:

"*All sales subject to strikes and accidents.*

SUMMERS BROS. & CO.,
MANUFACTURERS OF
BOX-ANNEALED COMMON AND REFINED SHEET IRON.

STRUTHERS, OHIO,
March 4, 1889.

"*To Hibbard, Spencer, B. & Co., Chicago:*

"Your favor of March 1 at hand. We make you the following offer: 1000 bdls. in March; 1000 bdls. in April; 1000 bdls. in May; 1000 bdls. in June; 500 bdls. in July; 500 bdls. in August—5000 bdls.

"March and April iron as follows: No. 27, 24x101, at $2.80, deld. Chicago; 26, 24x101, at $2.70, deld. Chicago; 16, 18x20, at $2.60, deld. Chicago.

"May, June, July, and August iron: No. 27, 24x101, at $2.85, deld. Chicago; 26, 24x101, at $2.75, deld. Chicago; 16, 18x20, at $2.65, deld. Chicago.

"All 60 days, or 2 per cent ten days from date of invoice,

"Yours resp'y,

"SUMMERS BROS. & CO."

On March 9th appellees replied, under a like letter-head as that in their first letter, as follows :

"*Summers Bros. & Co., Struthers, Ohio :*

"GENTLEMEN : Your favor 4th is at hand. If you are willing to revise your ideas a little we can trade with you. You may enter our order for 5000 bdls. first-class com. sheet iron, as follows : 500 bdls. March delivery ; 500 bdls. April delivery ; 1000 bdls. May delivery ; 1000 bdls. June delivery ; 1000 bdls. July delivery ; 1000 bdls. August delivery. Prices to be : Nos. 22 and 24, $2.60 ; 25 and 26, $2.70 ; 27, $2.80. Chicago delivery, 60 days, or 2 per cent cash in ten days.

"If you accept our offer you may enter us for March shipment 250 bdls. 26, 24x101 in., and 250 bdls. 27, 24x101 in.

"Awaiting your prompt reply, we are, very truly yours,

"HIBBARD, SPENCER, BARTLETT & CO."

On March 11th appellants mailed to appellees an acceptance of their offer, as follows :

"*All sales subject to strikes and accidents.*

SUMMERS BROS. & CO.,

MANUFACTURERS OF

BOX-ANNEALED COMMON AND REFINED SHEET IRON.

STRUTHERS, OHIO,
March 11, 1889.

"*To Hibbard, Spencer, B. & Co., Chicago :*

"MR. CHARLES : Dear Sir, your favor of March 9th at hand. We accept your offer, 5000 bdls. iron, 500 March, 500 April, 1000 May, 1000 June, 1000 July, 1000 August. Prices, No. 27 at $2.80 ; 26 at $2.70 ; 24 at $2.60. F. O. B. cars, Chicago, 2 per cent ten days from date of invoice. We also enter your order, 250 bdls. 26x101 and 250 bdls. 27x101, Mch. shipment.

"Resp'y yours,

"SUMMERS BROS. & CO."

In the latter part of March and early part of April, 1889, there was further correspondence between the parties, which resulted in an addition to the original contract of 3000 bundles of like sheet iron, at same figures, for July, August, and September delivery.

Appellants delivered only 1847 bundles of sheet iron under the first or original contract. They made no deliveries whatever under the second or additional contract. As an excuse for not making further deliveries, they, on July 24th, 1889, represented to appellees that the contracts were made "subject to strikes and accidents," and that they were prevented from filling the contracts in time by reason of breakages in their mills, and they still make, on this appeal, the same claims.

There was a deficit in the May delivery of 727 bundles, in the

June delivery of 639 bundles, and in the July delivery of 787 bundles. July 20th was the date of the last delivery. Appellees bought on the market, of other parties, on August 3d, 1889, 1000 bundles of sheet iron, on August 6th, 2000 bundles, on August 19, 1500 bundles, and on August 24th, 1000 bundles. These purchases were made in order to get iron to take the place of that which appellants had contracted to sell them. During the whole of September and into October the market price of sheet iron kept up, being at no time lower than the prices paid in the latter part of August. The total of the sheet iron delivered by appellants, added to that bought by appellees in the market, was 700 bundles less than the amount that appellants had contracted to deliver.

This suit was brought by appellees to recover from appellants the amount that they paid for the sheet iron in excess of the contract price. They made no claim in respect to the 700 bundles. The amount of the excess, less deductions for unpaid shipments, was $1546.61. The Court instructed the jury to find in favor of appellees for that amount. From the final judgment rendered in the trial court there was an appeal to the Appellate Court, where that judgment was affirmed. The present appeal is from such judgment of affirmance.

Leroy D. Thoman for the appellants.

Hamline, Scott & Lord for the appellees.

BAKER, J., delivered the opinion of the Court.

It is insisted by appellants that the words, "All sales subject to strikes and accidents," printed at the top of their letter-heads, must be considered in determining what the contract was, and that said words constituted an express condition that became a part of the contract between them and appellees. We do not so understand the case. Under date of March 1st, 1889, appellees invited appellants to make them an offer of sale of a specified quantity of sheet iron, to be delivered in certain designated months. On March 4th appellants made them an offer, as requested. On March 9th, in their letter of that date, appellees declined to accept the offer received, and at the same time they submitted for consideration an offer of their own—an offer of purchase. This offer contained all the elements and terms of a precise and complete contract, and lacked only the assent thereto of the persons to whom it was addressed to make it such a contract. The offer was to buy a certain quantity of sheet iron, of certain sizes, to be delivered in Chicago in specified quantities and at designated times, and to pay therefor certain prices at certain stated times, and appellees concluded their proposal by saying, "If you accept our offer you may enter us

for March shipment 250 bundles," etc. The offer was absolute and positive, and without any conditions, qualifications, or exceptions whatever. On March 11th appellants wrote to appellees: "Your favor of March 9th at hand. We accept your offer." And they thereupon proceeded to restate in their letter the terms of the proposal made to them. These two letters made the contract between the parties. The two preceding letters seem to us to be wholly immaterial. The mere fact that appellants wrote their acceptance on a blank form for letters, at the top of which were printed the words, "All sales subject to strikes and accidents," no more made those words a part of the contract than they made the other words there printed, "Summers Bros. & Co., Manufacturers of Box-annealed Common and Refined Sheet Iron," a part of the contract. The offer was absolute. The written acceptance which they themselves wrote was just as absolute. The printed words were not in the body of the letter or referred to therein. The fact that they were printed at the head of their letter-heads would not have the effect of preventing appellants from entering into an unconditional contract of sale.

In American Express Co. *v.* Pinckney, 29 Ill. 392, this Court said: "In a case where the agreement is partly written and in part printed, the preference is always given to the written part." In that case the printed matter was in the body of the instrument, incorporated and mingled with the written matter. It would seem there is more reason and occasion for applying the principle of law there invoked in a case where, as here, the words in print are separate and apart from the writing that appears upon the paper, and in a place where one would not be likely to look for limitations upon that which is written. People *ex rel. v.* Dulaney, 96 Ill. 503, is to the same effect as the case above cited.

When an instrument is in part written and in part printed, and these parts are apparently inconsistent, or there is a reasonable doubt upon the sense and meaning of the whole, the words in writing will control, because they are the immediate language and terms selected by the parties themselves for the expression of their meaning. Alsagu *v.* St. Katherine's Dock Co., 14 M. & W. 796, and Robertson & Thomasson *v.* French, 4 East, 360, both cases cited with approval in Express Co. Case, *supra*. In the case at bar it is inconsistent that the contract should be both an absolute contract and a conditional contract. The terms of payment in this contract were sixty days' time or 2 per cent discount for cash in ten days. Suppose the words, "All sales not paid for on delivery to draw interest," had been

printed on the letter-head ; can there be any doubt that the written terms would have controlled the printed words ? Here there was a written provision that the iron was to be delivered free on board the cars at Chicago. Suppose it had been printed on the letter-head that the manufacturers would not be responsible for iron after a delivery to a common carrier ; would not the written provision have governed the contract ?

Upon the whole, we are inclined to the opinion that the mere fact that the words in question were printed in the caption of the paper on which appellants wrote their unqualified acceptance of the contract proposed by appellees, did not have the effect of reading them into the agreement thereby consummated ; and appellants understood that some sort of an agreement was brought to a completion by their act, for in their letter they wrote : " We also enter your order for 250 bundles, etc., March shipment."

Appellants make a further claim that there was an implied condition in the contract, that would relieve them from performance if their mill plant, without any fault on their part, was so disabled as to make it impossible for them to make the iron that they contracted to deliver. The contract did not call for iron manufactured at their mill. It simply called for first-class common sheet iron of certain specified sizes. There was nothing to prevent their filling the contract by going into the market and buying sheet iron manufactured at other mills. Appellees seem to have experienced no difficulty, other than that of being forced to pay a higher price, when they went on the market and bought from other parties the sheet iron contracted for which appellants failed to supply. But even if the contract had been for sheet iron of their own manufacture, the breakages in this mill would not have relieved them from liability. The general doctrine is that where parties, by their own contract and positive undertaking, create a duty or charge upon themselves, they must abide by the contract and make the promise good, and either do the act or pay the damages. Steele *v.* Buck, 61 Ill. 343 ; Dehler *v.* Held, 50 Ill. 491 ; Bunn *v.* Prather, 21 Ill. 217. Inevitable accident affords them no relief, for they are regarded as insurers to the extent of making good the loss. There is a principle of the law that, in contracts in which the performance depends on the continued existence of a given or specified person or animal or thing, a condition is implied that the impossibility of performance arising from the perishing of the person, animal, or thing shall excuse the performance. But there is no place in this case for the application of that rule.

There is no doubt of the correctness of the rule stated by appellants, that where delivery is required to be made by instalments, the measure of damages will be estimated by the value at the time each delivery should be made. In the case at bar, appellees made threats to buy in at seller's expense, but excuses rendered and promises made by appellants of frequent and large shipments deterred them from doing so. If delivery is postponed by agreement between the parties, the measure of damages is the difference between the contract price and the market price at the time the article is deliverable by the subsequent agreement, and where the time of delivery is postponed indefinitely, the measure of damages is the difference between the contract price and the market value at a reasonable time after demanding performance. Appellees admit that they had no legal right to buy in, during the month of August, more than 3159 bundles of sheet iron, that being the quantity then due, under the original and additional contracts, on August 1st. But the uncontroverted evidence is, that the price of such iron remained firm during September and a part of October, being at no time lower than August prices. So the premature purchases worked appellants no injury, but were to their benefit. Besides this, it was held in Follansbee *v.* Adams, 86 Ill. 13, that the vendee may charge the vendor with the difference in prices without making any purchases, the result being the same, and the vendee being entitled to the benefit of his contract.

It is urged that the trial court committed error, in that it refused to allow to go to the jury testimony tending to prove that in June, 1889, one Charles, purchasing agent of appellees, made certain admissions to one of the appellants. There was no error in this action of the Court. The admission of such testimony would have been in violation of the rule that the terms of a written contract cannot be varied by parol evidence, and also in violation of another rule, that the statements of an agent are admissible only when they are part of the *res gestæ*, and are made *dum fervet opus*.

The making of the written contracts being admitted at the trial, the Court having construed them and held that the printed line in the caption of the letters was no part of such contracts, and having resolved, as matter of law, that there was no implied condition in them, growing out of their nature, the claimed deficit in the deliveries not being denied, and there being no conflict of testimony in respect to the state of facts upon which the damages were to be based, there remained in the case no question that required submission to the decision of the jury,

and it was not manifest error to direct a verdict for the plaintiffs, and instruct the jury at what amount to assess the damages.

Some minor points of objection are raised, but in them we find no reversible error.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

CHAPTER XIV.

DURESS.[1]

SKEATE *v.* BEALE.

IN THE QUEEN'S BENCH, TRINITY TERM, 1841.

[*Reported in* 11 *Adolphus & Ellis* 983.]

DEBT. The declaration stated that, whereas, before and at the time of the making of the agreement hereinafter mentioned, certain arrears of rent, amounting, etc., to wit, £19 10*s.*, had become and were due and in arrear to plaintiff for and in respect of certain lands and premises under and by virtue of a certain entire demise thereof, and plaintiff, before and at the time of the making of the said agreement, had distrained, in and upon a certain part of the said lands and premises, divers goods, etc., of defendant then being in and upon the said part of the said lands and premises, and being of great value, to wit, £19 10*s.*, as a distress for the said arrears of rent (and which said arrears, as to £16 2*s.* 6*d.*, parcel thereof, still remain due and unpaid), and, at the time of the making the said agreement, plaintiff continued and was in possession of the said goods, etc., and held the same as such distress as aforesaid; and thereupon, before the commencement of this suit, to wit, on February 16th, 1838, by a certain memorandum of agreement, bearing date a certain, etc., to wit, the day and year aforesaid, and then made by and between plaintiff and defendant, it was agreed in manner and form following—that is to say, in consideration of the plaintiff withdrawing the said distress then in force against the goods and chattels of the defendant for the said sum of £19 10*s.*, the defendant undertook to pay down the sum of £3 7*s.* 6*d.* in part payment of the above sum, and, in consideration as aforesaid, the defendant also

[1] The cases relating to fraud and mistake will be found, *supra*, pp. 7–30. —ED.

undertook and agreed, within one month from the date of the said agreement, to pay to the plaintiff £16 2*s.* 6*d.* (being the balance due upon the said sum of £19 10*s.*), and that, in default of defendant so doing, plaintiff should be at liberty to levy a distress upon the goods and chattels of defendant for the recovery thereof, or take any other steps for the recovery of the same as he might think proper. Averment that plaintiff, confiding, etc., did then, to wit, on, etc., under and in pursuance of the said agreement, withdraw the said distress, and did then quit and deliver up possession of the said goods, etc., so distrained, to defendant, whereof defendant then had notice; and although defendant, in part performance of the said agreement, did then, to wit, on, etc., pay down to plaintiff the said sum of £3 7*s.* 6*d.*, in part payment of the said sum of £19 10*s.* in the said agreement mentioned, and although the said period of one month from the date of the said agreement had elapsed before the commencement of this suit, yet defendant did not pay the £16 2*s.* 6*d.*, or any part thereof, within the said period or at any other time.

Pleas. 1. Not guilty. Issue thereon.

2. That just before the making of the said agreement in the declaration mentioned, to wit, on February 16th, 1838, plaintiff had wrongfully and injuriously seized, taken, and distrained divers goods and chattels of defendent, of great value, to wit, £20, under color and pretence, and in the name of a distress for a large sum of money, to wit, £19 10*s.*, then pretended by plaintiff to be due to him for arrears of rent of certain lands and premises, whereon the said goods and chattels of defendant then were; whereas, in truth and fact, a small part only, to wit, £3 7*s.* 6*d.*, was due to plaintiff for and on account of the said rent; and plaintiff then menaced and threatened, and was about to sell and dispose of the said goods and chattels of defendant, unless defendant would enter into and make the agreement in the declaration mentioned; and defendant then, by reason and in consequence of the premises, and in order to prevent the sale and disposing of his said goods and chattels, did on that occasion enter into and make the said agreement in the declaration mentioned. Verification. Replication. That the said agreement in the said declaration mentioned was not obtained from defendant by means of such wrongful and injurious seizing, taking, and distraining of the said goods and chattels of defendant, under such false color and pretence, as in the second plea in that behalf mentioned, in manner and form, etc.; conclusion to the country. Issue thereon.[1]

[1] Only so much of the case is given as relates to this question.—Ed.

3. That no part of the said sum of £19 10*s.*, except the said sum of £3 7*s.* 6*d.* parcel thereof, so paid by defendant to plaintiff as in the declaration mentioned, was due or in arrear to plaintiff in manner and form as in the declaration is alleged; and that there was no consideration for the making of the agreement in the declaration mentioned, except in respect of the said sum of £3 7*s.* 6*d.* so paid as aforesaid, or for the payment by defendant of any part of the said sum above demanded. Verification. Replication, that at the time of the making of the agreement in the said declaration mentioned the full sum of £19 10*s.*, and every part thereof, was due and in arrear to plaintiff, in manner and form, etc.; and that there was a good and sufficient consideration for the making of the said agreement, to wit, to the full amount of the said sum of £19 10*s.*, and for the payment by defendant of the said sum of £19 10*s.*, and every part thereof, in manner and form, etc.; conclusion to the country. Issue thereon.

On the trial before Coltman, J., at the Somersetshire summer assizes, 1838, a verdict was found for the plaintiff on the first issue, and for the defendant on the last two. In Michaelmas Term, 1838, Erle obtained a rule *nisi* for entering judgment for the plaintiff on the last two issues, *non obstante veredicto*.[1] In last Hilary Term.[2]

T. W. Saunders showed cause. The argument for the plaintiff will be that a written agreement is not void because obtained by wrongful duress of goods. If there had been no written agreement, and the whole money had been paid in order to release the goods, it is clear that the surplus, beyond the defendant's just claim, might have been recovered by an action for money had and received. Astley *v.* Reynolds.[3] There, indeed, a doubt seems to have been suggested whether a bond obtained by duress of goods could be avoided. But it is difficult to understand why any distinction should be made, in this respect, between an actual payment and a written engagement to pay; the probability, indeed, is that a party would be more cautious in making a payment than in writing a memorandum. In Atlee *v.* Backhouse[4] *assumpsit* was brought for money paid under a seizure alleged to be illegal; and the plaintiffs failed. But there the plaintiffs had expressly agreed to waive the objection to the seizure; and that fact is relied upon by Parke, B.,[5] who

[1] The rule was also for a new trial, but as the judgment of the Court related only to matter on the record, it is not thought necessary to state the facts or the arguments respecting them.

[2] January 18th. Before Lord Denman, C.J., Littledale, and Coleridge, JJ.

[3] 2 Str. 915. [4] 3 M. & W. 633. [5] *Ibid.* 650.

assumes that money paid to obtain goods unlawfully detained may be recovered back. Here, after verdict, the seizure must be taken to be illegal. [Coleridge, J. Lindon *v.* Hooper[1] is a strong case against you.] That seems to have been decided on the ground that trespass, for taking the goods, was a fitter remedy than money had and received, for a payment made to recover them, because the defendant, in the latter action, would be taken by surprise, not being able to anticipate the ground on which the distress was to be resisted.[2] But now this difficulty is obviated by the new rules of pleading. The plaintiff, who insists upon his forbearance as a consideration, must show that the right which he forbore to enforce against the defendant was a valid right. Jones *v.* Ashburnham.[3] Here the plaintiff knew that he had no right. [Coleridge, J., referred to Knibbs *v.* Hall.[4]] There the distress was only threatened ; there was no actual duress of goods. [Littledale, J., cited Hamlet *v.* Richardson.[5]] The process, in that case, had been sued out *bonâ fide* by the party who received the money for forbearance.

Erle, contra. The record does not suggest any knowledge by the plaintiff that his original claim was unfounded. The distress was good, if anything at all was due ; and the record admits that something was due. Therefore, whatever the party distrained upon chose to pay, for the purpose of getting rid of the distress, would have been paid upon good consideration, and could not be recovered back. Lindon *v.* Hooper[6] cannot be distinguished, and the principle of Knibbs *v.* Hall[7] applies, for a threat of distress, if believed, is compulsory, as much as an actual distress. In Atlee *v.* Backhouse[8] the plaintiff was held to be rightly non-suited, even on his own assumption of the illegality of the seizure. In Longridge *v.* Dorville[9] it was held to be a good consideration, in *assumpsit*, that the plaintiff gave up property belonging to defendant, which plaintiff had detained, though his right to do so was doubtful. But, generally, duress of goods is no ground for avoiding a written agreement. In Sheppard's Touchstone, p. 61, instances are given in which deeds are avoided by personal duress ; but it is said : " If one distrain my beasts, to compel me to seal a deed, and will not deliver them unless I do so, and threaten me that if I take the beasts again and not seal the deed he will kill me, and

[1] 1 Cowp. 414. [2] *Ibid.* 418. [3] 4 East, 455.
[4] 1 Esp. 84. [5] 9 Bing. 644. [6] 1 Cowp. 414.
[7] 1 Esp. 84. [8] 3 M. & W. 633.
[9] 5 B. & Ald. 117. See Haigh *v.* Brooks, 10 A. & E. 309 ; Brooks *v.* Haigh, 10 A. & E. 323.

thereupon I seal the deed ; this is a good deed and shall bind me."

Cur. adv. vult.

LORD DENMAN, C.J., in this term (May 7th), delivered the judgment of the Court.

This was a motion for leave to enter judgment for the plaintiff, notwithstanding the verdict which has passed for the defendant on two pleas. The declaration is upon an agreement, and it states a distress upon lands in the occupation of defendant, for £19 10*s.* of rent ; and that, in consideration that plaintiff would withdraw the distress, defendant undertook to pay down £3 7*s.* 6*d.* in part, and the remainder, £16 2*s.* 6*d.*, within one month from the date ; and, in default thereof, plaintiff was to be at liberty to distrain afresh, or take any steps he might think proper for the recovery of the money. Performance on the plaintiff's part is alleged, and payment by the defendant of the £3 7*s.* 6*d.* A breach is then assigned in the non-payment of the £16 2*s.* 6*d.*

To this the defendant pleads that, before making the agreement, the plaintiff had wrongfully distrained defendant's goods to the value of £20, under pretence of a distress for £19 10*s.*, pretended to be due for rent, whereas in fact only £3 7*s.* 6*d.* was due ; and the plaintiff menaced, and was about to sell the said goods unless defendant would enter into the said agreement ; and, by reason of the premises, and in order to prevent the sale, defendant entered into the agreement.

We consider the law to be clear, and founded on good reason, that an agreement is not void because made under duress of goods. There is no distinction in this respect between a deed and an agreement not under seal ; and with regard to the former, the law is laid down in 2 Inst. 483 and Sheppard's Touchstone, p. 61, and the distinction pointed out between duress of, or menace to, the person, and duress of goods. The former is a constraining force, which not only takes away the free agency, but may leave no room for appeal to the law for a remedy. A man, therefore, is not bound by the agreement which he enters into under such circumstances, but the fear that goods may be taken or injured does not deprive any one of his free agency who possesses that ordinary degree of firmness which the law requires all to exert.[1] It is not necessary now to enter into the consideration of cases in which it has been held that money paid to redeem goods wrongfully seized, or to prevent their wrongful seizure, may be recovered back in

[1] See The Duke de Cadaval *v.* Collins, 4 A. & E. 858 ; Wilson *v.* Ray, 10 A. & E. 82.

an action for money had and received, for the distinction between those cases and the present, which must be taken to be that of an agreement, not compulsorily, but voluntarily entered into, is obvious. Lindon *v.* Hooper[1] and Knibbs *v.* Hall[2] are, however, authorities to show that, even if the money had been paid in this case, instead of the agreement to pay it entered into, no action for money had and received could have been sustained by the now defendant. For although there is a difference in the circumstances, and the distress having been made, and some rent admitted to be in arrear, no replevin could have been successfully made, yet if the plaintiff distrained goods of the value of £20 when little more than £3 were due, there is no doubt that, on payment of the value of the goods, or the sum claimed, an action would have lain for the excessive distress. And it is of great importance that parties should be holden to those remedies for injuries which the law prescribes, rather than allowed to enter into agreements with a view to prevent them, intending at the time not to keep their contracts. In the argument for the defendant, reliance was placed on the facts that the agreement was entered into under protest, and that the plaintiff must have known that only the smaller amount of rent was due. It is unnecessary to consider what the effect of these would have been, for neither of them is alleged in the plea. As, therefore, this plea relies solely on the menace as to the goods under which the agreement was made for avoiding it, we think it discloses no answer to the declaration.

The third plea remains to be considered. In this the defendant alleges that only £3 7*s.* 6*d.* of the £19 10*s.* were due, and that there was no consideration for making the agreement, but the said sum of £3 7*s.* 6*d.* But as this plea does not deny the facts of the claim made by plaintiff for the larger sum, the distress in consequence, the agreement entered into, such as the declaration describes, and the distress thereupon withdrawn, it appears that, as a consideration for the agreement, the plaintiff forewent the benefit of the immediate security and payment of the whole rent, and the defendant gained the immediate withdrawal of the distress. Both of these were entirely collateral to the question, whether the larger or smaller sum was in fact due, and formed a sufficient consideration for the agreement, even though the claim to the larger should in the end be decided to be unfounded, as by the verdict it must be taken to have been. The consideration being not unlawful, we cannot enter into its adequacy.[3] And it may be observed, in general

[1] 1 Cowp. 414.
[2] 1 Esp. 84.
[3] Hitchcock *v.* Coker, 6 A. & E. 438, 456.

terms, that arrangements of this kind often have the effect of obliterating the proof of the former state of the accounts between the parties. We think, therefore, that this plea is also bad, and that the rule must be absolute for judgment, notwithstanding the finding; which makes it unnecessary to consider the second part of the plaintiff's application, which was for a new trial.

Rule absolute for judgment *non obstante veredicto*.

SILLIMAN *v.* UNITED STATES.

UNITED STATES *v.* SILLIMAN.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1879.

[*Reported in* 101 *United States Reports* 465.]

APPEALS from the Court of Claims.

The case as set forth in the findings of fact is this:

In 1863, claimants were partners in trade, doing business in the city of New York, under the firm style of Silliman, Matthews & Co. At various times they executed with the United States (the latter represented by Major Van Vliet of the quartermaster's department) several charterparties for barges of which they were owners. The barges were delivered to the quartermaster's department, and remained in service during the periods respectively set forth in the petition. The claimants were paid at the charter rates up to and including October 31st, 1863.

On June 2d, 1863, the Quartermaster-General, by letter, instructed Quartermaster Van Vliet that all double-decked barges then in service and used for transporting cattle, horses, etc., should, from and after the 1st of that month, be made to conform to a standard of compensation at rates not to exceed $4 per ton per month.

The owners of the barges, being notified by Major Van Vliet of the Quartermaster-General's instructions, replied that their barges were only measured as single-deck, and that the rate of $4 per ton per month would not pay them unless they were allowed to measure the upper deck also, and that rather than accept the reduction they preferred to have their boats discharged.

This reply of the claimants having been communicated to

the Quartermaster-General, he directed Major Van Vliet to discharge the barges from service as rapidly as he could procure others upon the terms just stated, and under a new form of charterparty prescribed by the Quartermaster-General.

In reply to this direction Major Van Vliet, on July 22d, 1863, informed the Quartermaster-General that it was impossible to obtain barges at New York at the rates indicated by the latter, taking the registered tonnage as the standard of measurement, which represented only their hold-measurement, and not their actual carrying capacity ; and that compensation at the rate of $4 per ton of actual carrying capacity would exceed that stipulated for in the then existing charterparties.

From July 22d, 1863, till December, 1863, no further correspondence took place in regard to the barges, and they remained in the service as before.

On December 10th, 1863, the Quartermaster-General instructed Major Van Vliet that the double-decked barges chartered by the latter must be brought within the price stated in the letter of June 2d, 1863, and that no higher rate would be allowed for them from and after December 1st, 1863.

This instruction having been communicated by Major Van Vliet to the claimants, the latter, on December 14th, having before them the form of the new charterparty which had been proposed by the Quartermaster-General, stated to Major Van Vliet, by letter, that rather than sign the new charterparty they had decided to have their barges returned to them, and that they would not let them for $4 per ton per month.

On December 28th, 1863, the Quartermaster-General issued a circular letter to several quartermasters, and assistant quartermasters, among whom was Major Van Vliet, stating that no payments would be made for charter money for services rendered and due after March 31st, 1863, under any other form of charterparty than that which had, on the last-named date, been prescribed by the Quartermaster-General.

After the date of the last-mentioned letter, one of the claimants, Silliman, went to Washington and demanded of the Quartermaster-General the return of the barges to the claimants at New York. That officer replied that the government could not spare them ; and when Silliman remonstrated with him against their retention by the government, the Quartermaster-General said the government needed the barges and would keep them, and he declined to pay the arrears then due the claimants for their services under the original charterparties. Thereafter the claimants made repeated calls on Major Van Vliet for arrearages of money, and were informed

that he was ordered not to pay them any until they had made new charterparties.

On January 8th, 1864, the claimants addressed a letter to the Secretary of War, complaining of the treatment they had received from officers under him, stating that two of them had gone to Washington and could find no person who would modify the new charterparty so that they might accept the terms that could be agreed upon, and adding the following words :

" We now complain as follows, viz.:

" 1. That we have requested that our barges be returned to New York and delivered to us as per charterparty, and have been refused.

" 2. That we have ' certificates of service' for November and December, 1863, and the quartermaster at New York has orders not to pay until we make new charters, and we refuse to make them as the blank charters dictate, but are willing to make some concession in price if any person can be named here to negotiate.

" 3. We desire to sell, if we cannot have our barges or obtain money for their use, as we cannot meet our obligations to our captains and crews without money to do it, and hope you will act favorably for us at an early date."

On March 5th, 1864, the claimants wrote to the Quartermaster-General, proposing to accept the new charterparties from the first of the month nearest the acceptance of the same, with certain modifications.

These modifications were accepted by the Quartermaster-General on March 19th, 1864, with the exception of the date offered for their taking effect, which he required should be on April 1st, 1863.

On March 23d, 1864, the claimants, by letter to the Quartermaster-General, said as follows :

" We have been paid to November 1st, 1863, and if we have to go back to April 1st, 1863, we shall have to stop payment, as we have depended on this money to keep along in our business. . . . We have been told by other parties that they dated new charters from December 1st, and we can see no reason that they should be favored above us. . . . We cannot go back to April 1st, 1863."

To this letter the Quartermaster-General replied, on April 11th, 1864, that all charterparties, without exception, executed to take effect December 1st, 1863, for vessels in the service April 1st, 1863, had been required to take effect from the latter date.

After this letter the claimant, Matthews, went to Washington

and had interviews with the Quartermaster-General and other officers in his office, in which he again remonstrated, as had before been done by his partner, Silliman ; to which the Quartermaster-General replied that they had laid down the rule and were determined that nothing else should be done until the new charterparties had been executed ; that until that was done they would keep the barges and not pay for them. Said Matthews, during his visit to Washington, finally agreed with Colonel Clary, an officer in the Quartermaster-General's office, to make the new charterparties, stating that they did so under protest and yielded to necessity, and insisting, after he had agreed to make them, that it was wrong to make new charterparties.

On May 16th, 1864, in pursuance of Matthew's agreement, the new charterparties were signed by the claimants and an officer of the quartermaster's department.

The compensation therein stipulated to be paid after October 31st, 1863, was, from and after that date, from time to time, paid to the claimants for each of the barges, and when each payment was made the claimants, without objection or protest, gave a receipt therefor as " in full of the above account."

The claimants in their petition assert claims against the United States for certain balances, computed upon the basis of the original charterparties, after crediting the several sums received from time to time under the last agreements or charterparties, which they claim to have been executed under compulsion, and not, therefore, binding upon them.

They also sue to recover damages alleged to have resulted from the use of the barges in a negligent and improper manner by the agents of the government, and for injuries done to them while in the government service, not attributable to ordinary wear and tear.

The Court of Claims held claimants bound by the terms of the charterparties last executed, but allowed a portion of the damages claimed.

Both parties appealed from the judgment.

Thomas J. Durant and *Charles W. Hornor* for Silliman.

The Attorney General contra.

HARLAN, J., after stating the facts, delivered the opinion of the Court.

The barges in question were delivered by claimants to the government under the original charterparties, binding the latter to pay for their use at an agreed rate, during such period as they were retained in its service. The government was as much bound by the terms of the contracts as were the claim-

ants, and no alteration thereof could take place without the assent of both contracting parties.

The quartermaster's department demanded that the claimants should execute new charterparties, containing stipulations essentially different as to compensation, from those embodied in the contracts under which the government obtained possession of the barges. It announced its purpose to retain possession, and withhold all compensation, unless and until the claimants executed the proposed new charterparties. In other words, the department informed claimants that it would not comply with the provisions of the original contracts unless the claimants would submit to material alterations against their interests and to the advantage of the government. Claimants distinctly refused to give their assent to the proposed alterations, and asked that the barges be returned. But this reasonable request was not complied with by the agents of the government. Their conduct was in plain violation of the rights of the claimants.

Had the claimants stood upon their contract rights it is perfectly clear that the government could have been compelled to pay the amount stipulated in the original contracts to be paid for the use of the barges. The claimants could have sued for each instalment of rent as it became due, or when the government returned the barges they could have sued, as they now sue, for the whole amount due under the original charterparties. They had a full and complete remedy by suit against the government in the Court of Claims for the enforcement of their rights under those contracts. That Court had then, as it has now, jurisdiction to hear and determine all claims founded upon contracts, express or implied, with the United States. Its final judgments, sustaining such claims, were then as now made payable out of any general appropriation by law for the satisfaction of private claims against the government.

Instead, however, of seeking the aid of the law, claimants, with a full knowledge of their legal rights, executed new charterparties, and, from time to time, received payments according to the rates prescribed therein—protesting, when the new agreements were signed, that they were executed against their wishes and under the pressure of financial necessity. They now seek the aid of the law to enforce their rights under the original charterparties, upon the ground that those last signed were executed under such circumstances as amounted, in law, to duress. Duress of, or in, what? Not of their persons, for there is no pretence that a refusal, on their part, to accede to the illegal demand of the quartermaster's department

would have endangered their liberty or their personal security. There was no threat of injury to their persons or to their property, to avoid which it became necessary to execute new charterparties. Nor were those charterparties executed for the purpose or as a means of obtaining possession of their property. They yielded to the threat or demand of the department solely because they required, or supposed they required, money for the conduct of their business or to meet their pecuniary obligations to others. Their duty, if they expected to rely upon the law for protection, was to disregard the threat of the department, and apply to the courts for redress against its repudiation of a valid contract.

We are aware of no authority in the text-books or in the adjudged cases to justify us in holding that the last charterparties were executed under duress. There is present no element of duress, in the legal acceptation of that word. The hardships of particular cases should not induce the courts to disregard the long-settled rules of law.

The case is one which in some aspects appeals strongly to the sense of justice of the government, which cannot afford to reap the fruits of an arbitrary abrogation by its officers, of valid, binding contracts made in its name with the citizen. If, in view of the condition of the country during the recent war, the claimants were unwilling to embarrass or imperil the operations of the government by contests in the courts as to property which, possibly, was needed by the military department for supplying the necessities of our army, these facts only strengthen their claim to relief. But that relief must come from the legislative, and not from the judicial department.

We perceive no error in the judgment, and it is, as to all parties,

Affirmed.

EMMONS W. KINGSBURY *v.* JOSHUA D. SARGENT AND ANOTHER.

IN THE SUPREME JUDICIAL COURT OF MAINE, MARCH 18, 1891.

[*Reported in* 83 *Maine* 230.]

ON report.

The case is stated in the opinion.

Peregrine White for defendants.

G. W. Howe for plaintiff.

EMERY, J. On report. The action is *assumpsit* by an officer against receiptors upon their written receipt for property

attached by him on a writ against John D. Sargent, one of the receiptors and husband of Mary Sargent, the other receiptor. The receipt was in the usual form upon a printed blank, with this concluding printed clause: "And we further agree that this receipt shall be conclusive evidence against us as to our receipt of said property, its value before-mentioned, and our liability under all circumstances to said officer for the full sum above mentioned." Judgment was obtained in the suit against Joshua, and execution issued thereon, upon which execution the officer seasonably made demand on the receiptors for the attached property. Delivery was refused. In this action upon the receipt, the defendants under proper pleadings rest their defence solely upon their contention that the receipt was obtained from them by duress or fraud on the part of the officer.

The defendants' evidence, giving it all reasonable effect, amounts to this: The plaintiff, a deputy sheriff, having a writ against Joshua, and having orders to attach thereon the cattle on his farm, waited upon him at his farm for that purpose. Joshua told the officer that the cattle belonged to his wife, who was sick in her chamber from recent child-birth (the child being two days old), and asked the officer to go with him to the wife's room, that she might formally forbid the attachment. The officer went with the husband to the wife's room, and there she forbade the attachment, claiming the cattle as her own. The officer replied that he must nevertheless attach the cattle according to his instructions, he having a good bond. He then left the house, and with his assistant began gathering the cattle together to take away. In doing this, there was much shouting at and whipping of the cattle to keep them in place. This disturbed and excited the wife, and her nurse told the husband he must get rid of those men somehow or other. Mr. Sargent spoke to the officer, who advised him to have the cattle receipted for, and the ownership determined. A neighbor, Mr. Frees, was called in, but he declined to sign the receipt. Then all three went into the house, to the wife's room. The officer there said that if they wanted to keep the cattle from being driven away, they must sign a receipt for them. The wife at first refused to sign any receipt, declaring she would not give up her claim. The officer said she would not be signing away her claim to the cattle, but only becoming security for them until the ownership could be determined. She then appealed to her husband and her neighbor, Mr. Frees, both of whom advised her to sign it. She thereupon took the paper from the officer and signed it with her husband. She did not read the paper, nor hear it read, and did not know the

contents of it. The husband heard it read over after the signing, but did not notice the clause above quoted.

The officer's version is entirely opposed to that of the defendants, but we have no occasion to consider it.

1. As to duress. A comparison of this case with Harmon *v.* Harmon, 61 Maine, 227 ; Higgins *v.* Brown, 78 Maine, 473 ; and Hilborn *v.* Bucknam, 78 Maine, 482, must make it evident that here was no legal duress, such as would avoid the receipt. The officer used no unlawful threats—exercised no unlawful force. The peculiar circumstances of the wife's illness and weakness made the occasion painful, and the emergency perhaps severe ; but the officer was within the line of his duty. He did not seek the wife, and, indeed, she did not sign at his request, but only after seeking the advice of her husband and neighbor.

2. As to fraud. In considering this defence, it is to be borne in mind that no fiduciary relation existed between the parties. The defendants from the first regarded the officer as antagonistic. The situation was this : The defendants desired to withdraw the cattle from the custody of the officer. There were several ways open to them. They could pay the debt—replevy the cattle—or receipt for them. They could also abandon the cattle, and hold the officer for all damages. They chose to receipt for them. The receipt was prepared and presented to them. No statement was made to them of its contents, or terms. At the most, there was only a statement of an opinion, that the receipt would not operate in law to estop the wife from asserting her own claim. Perhaps it would not, had she returned the cattle to the officer, and thus satisfied the receipt. Its terms and contents were fully open to them, however. It fully stated the obligations they assumed by signing it. They signed it without duress, and thereby obtained their object, the release of the cattle from the officer's custody.

They cannot now, after having attained their purpose, avoid their own reciprocal engagement by showing that they did not read the paper—did not know its terms—or were misled by the officer's erroneous opinion as to its legal effect. They should have re-delivered the property according to their engagement, and having fulfilled that, they would have been relieved. They stipulated, however, that they would not question their liability in an action on the receipt, and by that stipulation they must now abide.

This rule may seem severe upon the weak, thoughtless, or unlearned ; but reflection will satisfy the mind that the rule is essential to the certainty and security of titles, and to the faith

and value of contracts. Without such a rule, business could not be carried on. Grant *v.* Grant, 56 Maine, 573 ; Insurance Co. *v.* Hodgkins, 66 Maine, 109 ; Thompson *v.* Insurance Co. 75 Maine, 55 ; Abbott *v.* Treat, 78 Maine, 121 ; Upton *v.* Tribilcock, 91 U. S. 50.

By their receipt, the defendants also stipulated that if they did not re-deliver the property, they would pay the value, $150. By failing to re-deliver the cattle they have now become liable to pay that sum. Whether or not the wife owned the cattle is immaterial in this action. Rather than re-deliver the cattle, and pursue such remedies as might then be open before her, she elected to retain the cattle, and thus allow her liability upon the receipt to become fixed. Penobscot Boom Co. *v.* Wilkins, 27 Maine, 345 ; Drew *v.* Livermore, 40 Maine, 266. The officer, however, only asks for damages enough to satisfy the execution on the judgment against Joshua, which appears to be $113.07, with interest from date of judgment, May 12th, 1888. Hence damages will be limited to that amount.

Judgment for plaintiff.

PETERS, C.J., WALTON, VIRGIN, FOSTER, and HASKELL, JJ., concurred.

ALFRED F. DUNHAM, RESPONDENT, *v.* EDMUND GRISWOLD, APPELLANT.

IN THE COURT OF APPEALS OF NEW YORK, OCTOBER 27, 1885.

[*Reported in* 100 *New York Reports* 224.]

APPEAL from judgment of the General Term of the Supreme Court, in the Second Judicial Department, entered upon an order made February 13th, 1883, which affirmed a judgment in favor of plaintiff, entered upon a decision of the Court on trial without a jury.

The nature of the action and the material facts are stated in the opinion.

James J. Fox for appellant.

John H. Clapp for respondent.

EARL, J. The plaintiff claimed that prior to September, 1881, he intrusted the defendant with certain securities which were to be converted into money and the proceeds invested for him, but that the defendant converted the proceeds to his own use, and he claimed that the defendant was indebted to him on account of such proceeds in the sum of $9000 ; and to adjust

the claim of the plaintiff, which we may assume the defendant disputed, he settled with the plaintiff and an account was stated in which the defendant acknowledged that there was $9000 due the plaintiff, and he executed a written agreement to pay the plaintiff that sum. This action was brought to recover the sum which was thus adjusted by the settlement and which the defendant thus agreed to pay.

It was no defence to this action for the defendant to prove that he did not owe the plaintiff anything. The plaintiff having made a claim against him and he having disputed it, and the parties having settled the dispute by agreeing upon the amount due in an account stated which the defendant promised to pay, that promise is founded upon a sufficient consideration and can be enforced against him although he might be able to prove that nothing was in fact due from him. Stewart *v.* Ahrenfeldt, 4 Denio, 189; Wehrum *v.* Kuhn, 61 N. Y. 623; Feeter *v.* Weber, 78 N. Y. 334, 337.

But the defendant further claims that he made the adjustment and promise and signed the agreement to pay the plaintiff under duress, and hence that he is not bound by the agreement. The facts as to the duress depend entirely upon the evidence of the defendant, and it was, for the Trial Court, under all the circumstances of the case, to determine to what extent such evidence was entitled to credence. Upon the evidence it was a question of fact whether the agreement was executed in consequence of any duress whatever. The Court could have found, and we may assume did find, that the only threats used, if any, were to arrest the defendant in a civil action for the wrong which he had done the plaintiff. The negotiations for the settlement were pending several days. The defendant was not under arrest or restrained of his liberty in any way. He appears to have been a business man in the full possession of his faculties, and the plaintiff was an old man, his uncle. A mere threat to sue the defendant and to arrest him in such suit, or by virtue of an execution which could be issued upon a judgment obtained therein, would not be such duress as would avoid a promise induced by such threat. 1 Pars. on Cont. (5th ed.) 393; Shephard *v.* Watrous, 3 Caines, 166; Farmer *v.* Walter, 2 Edw. Ch. 601; Knapp *v.* Hyde, 60 Barb. 80. When there is no arrest, no imprisonment, no actual force, and it is claimed that a promise was obtained by duress *per minas*, then whether or not the promise was obtained by duress must usually be a question of fact, and the question cannot be determined as one of law. It is not sufficient in such a case to satisfy the Trial Court that the threats

were uttered ; but it must also be shown that they constrained the will of the promisor and induced the promise. The Trial Court in this case was not bound to believe the defendant when he testified that he made the adjustment with the plaintiff and signed the agreement to pay him the $9000 solely in consequence of the threats. Whether he did or not was, under the circumstances disclosed in this case, and from the character of the evidence given, an inference of fact with which we have no jurisdiction to interfere.

The judgment should be affirmed.

All concur.

Judgment affirmed.

JAMES N. MORSE *v.* ARTEMAS B. WOODWORTH.

In the Supreme Judicial Court of Massachusetts, June 26, 1891.

[*Reported in* 155 *Massachusetts* 233.]

J. N. Marshall and *J. C. Burke* for Woodworth.

G. F. Richardson (*D. M. Richardson* with him) for Morse.

Knowlton, J. The only remaining exceptions relate to the requests of the defendant and the rulings of the Court in regard to duress.[1] The plaintiff contended that he gave up the note, and signed the release under duress by threats of imprisonment. The question of law involved is whether one who believes and has reason to believe that another has committed a crime, and who, by threats of prosecution and imprisonment for the crimes overcomes the will of the other, and induces him to execute a contract which he would not have made voluntarily, can enforce the contract if the other attempts to avoid it on the ground of duress.

Duress at the common law is of two kinds, duress by imprisonment and duress by threats. Some of the definitions of duress *per minas* are not broad enough to include constraint by threats of imprisonment. But it is well settled that threats of unlawful imprisonment may be made the means of duress, as well as threats of grievous bodily harm. The rule as to duress *per minas* has now a broader application than formerly. It is founded on the principle that a contract rests on the free and voluntary action of the minds of the parties meeting in an

[1] The statement of facts has been omitted, and only so much of the opinion is given as relates to this question.—Ed.

agreement which is to be binding upon them. If an influence is exerted on one of them of such a kind as to overcome his will and compel a formal assent to an undertaking when he does not really agree to it, and so to make that appear to be his act which is not his but another's, imposed on him through fear which deprives him of self-control, there is no contract unless the other deals with him in good faith, in ignorance of the improper influence, and in the belief that he is acting voluntarily.

To set aside a contract for duress it must be shown, first, that the will of one of the parties was overcome, and that he was thus subjected to the power of another, and that the means used to induce him to act were of such a kind as would overcome the mind and will of an ordinary person. It has often been held that threats of civil suits and of ordinary proceedings against property are not enough, because ordinary persons do not cease to act voluntarily on account of such threats. But threats of imprisonment may be so violent and forceful as to have that effect. It must also be shown that the other party to the contract is not, through ignorance of the duress or for any other reason, in a position which entitles him to take advantage of a contract made under constraint without voluntary assent to it. If he knows that means have been used to overcome the will of him with whom he is dealing, so that he is to obtain a formal agreement which is not a real agreement, it is against equity and good conscience for him to become a party to the contract, and it is unlawful for him to attempt to gain a benefit from such an influence improperly exerted.

A contract obtained by duress of unlawful imprisonment is voidable. And if the imprisonment is under legal process in regular form, it is nevertheless unlawful as against one who procured it improperly for the purpose of obtaining the execution of a contract ; and a contract obtained by means of it is voidable for duress. So it has been said that imprisonment under a legal process issued for a just cause is duress that will avoid a contract if such imprisonment is unlawfully used to obtain the contract. Richardson *v.* Duncan, 3 N. H. 508. See also Foshay *v.* Ferguson, 5 Hill, N. Y. 154 ; United States *v.* Huckabee, 16 Wall. 414, 431 ; Miller *v.* Miller, 68 Penn. St. 486 ; Walbridge *v.* Arnold, 21 Conn. 424 ; Wood *v.* Graves, 144 Mass. 365, and cases cited.

It has sometimes been held that threats of imprisonment, to constitute duress, must be of unlawful imprisonment. But the question is whether the threat is of imprisonment which will be unlawful in reference to the conduct of the threatener who is seeking to obtain a contract by his threat. Imprisonment that

is suffered through the execution of a threat which was made for the purpose of forcing a guilty person to enter into a contract may be lawful as against the authorities and the public, but unlawful as against the threatener, when considered in reference to his effort to use for his private benefit processes provided for the protection of the public and the punishment of crime. One who has overcome the mind and will of another for his own advantage, under such circumstances, is guilty of a perversion and abuse of laws which were made for another purpose, and he is in no position to claim the advantage of a formal contract obtained in that way, on the ground that the rights of the parties are to be determined by their language and their overt acts, without reference to the influences which moved them. In such a case, there is no reason why one should be bound by a contract obtained by force, which in reality is not his, but another's.

We are aware that there are cases which tend to support the contention of the defendant. Harmon *v.* Harmon, 61 Maine, 227 ; Bodine *v.* Morgan, 10 Stew. 426, 428 ; Landa *v.* Obert, 45 Texas, 539 ; Knapp *v.* Hyde, 60 Barb. 80. But we are of opinion that the view of the subject heretofore taken by this Court, which we have followed in this opinion, rests on sound principles, and is in conformity with most of the recent decisions in such cases, both in England and America. Hackett *v.* King, 6 Allen, 58 ; Taylor *v.* Jaques, 106 Mass. 291 ; Harris *v.* Carmody, 131 Mass. 51 ; Bryant *v.* Peck & Whipple Co. 154 Mass. 460 ; Williams *v.* Bayley, L. R. 1 H. L. 200 ; S. C. 4 Giff. 638, 663, note ; Eadie *v.* Slimmon, 26 N. Y. 9 ; Adams *v.* Irving National Bank, 116 N. Y. 606 ; Foley *v.* Greene, 14 R. I. 618 ; Sharon *v.* Gager, 46 Conn. 189 ; Bane *v.* Detrick, 52 Ill. 19 ; Fay *v.* Oatley, 6 Wis. 42.

We do not intimate that a note given in consideration of money embezzled from the payee can be avoided on the ground of duress, merely because the fear of arrest and imprisonment, if he failed to pay, was one of the inducements to the embezzler to make the note. But if the fact that he is liable to arrest and imprisonment is used as a threat to overcome his will and compel a settlement which he would not have made voluntarily, the case is different. The question in every such case is, whether his liability to imprisonment was used against him, by way of a threat, to force a settlement. If so, the use was improper and unlawful, and if the threats were such as would naturally overcome the mind and will of an ordinary man, and if they overcame his, he may avoid the settlement. The rulings and refusals to rule were correct.

Exceptions overruled.

N. B. THOMPSON ET AL. *v.* MICHAEL NIGGLEY ET AL.

IN THE SUPREME COURT OF KANSAS, JULY TERM, 1894.

[*Reported in* 53 *Kansas* 664.]

ERROR from Marshall District Court.

Action by Thompson and another against Niggley and wife to recover on a note and mortgage. Judgment for the defendants at the February Term, 1890. The plaintiffs bring the case here. The opinion states the facts.

J. A. Broughten for plaintiffs in error.

E. A. Berry and *Mann & Redmond* for defendants in error.

The opinion of the Court was delivered by

ALLEN, J. N. B. Thompson and H. F. Talbot, as partners, brought suit on a note executed by Michael Niggley and Fannie Niggley, his wife, for $1250, payable to Rudolph Summers, and to foreclose mortgages given to secure the same. The plaintiffs claimed to be purchasers of the note and mortgages from Summers. The defendants, in their answer, admit the execution of the note and mortgages, but allege that they were without consideration, and were obtained by fraud and duress. It appears that Michael Niggley kept a billiard saloon in Waterville ; that late one evening, as he was taking his cash from his money drawer, preparatory to closing up for the night, he had a revolver out, which accidentally went off, hitting Summers. Summers, though seriously hurt, recovered so as to be able to get about. Some friends of his soon after talked to Niggley about a settlement of Summer's claim for damages growing out of the injury. On the day on which the note and mortgages were executed, friends of Summers again approached Niggley with reference to a settlement, telling him that, if charges were preferred against him for selling whiskey, they would have to swear against him. They induced Niggley to go with them to the office of one Griffiths, who acted as attorney for Summers. While there, there was further talk about a settlement of Summers's claim. Summers and several of his friends were present. They kept Niggley there and sent for his wife, who left a very sick child and went to Griffiths' room. Griffiths threatened to prosecute Niggley for selling whiskey if he did not accede to his demands and execute the note and mortgages sued on. The case was submitted to a jury, who rendered a general verdict in favor of the defendants, and also, in answer to special questions, found that the signatures, both

of Niggley and his wife, were obtained by duress, and through fear of criminal prosecution. Niggley himself testified on the witness stand that he had been selling liquor in violation of law.

The principal question discussed in the briefs is, whether a charge of duress can be maintained by showing threats to prosecute a person for an offence of which he is in fact guilty. It does not appear that any complaint had been filed against Niggley, nor was there any pretence that process had been issued for his arrest. Long lists of authorities are cited by counsel on both sides for the purpose of showing the rules that have been declared by the various courts as to what constitutes duress. It is impossible to extract from the cases any complete definition which has been uniformly adhered to. There are cases holding that mere threats of criminal prosecution, when no warrant has been issued, do not constitute duress. Higgins *v.* Brown, 78 Me. 473; Harmon *v.* Harmon, 61 Me. 227; Buchanan *v.* Sahlein, 9 Mo. App. 552. This Court, however, held, in the case of National Bank *v.* Croco, 46 Kas. 620, that

"If the creditor operated upon the fears of the husband by threats of arrest and imprisonment, believed by him to be imminent, and thus overcame his will, and through fear and undue influence compelled him to sign the mortgage, the signature is not binding; and if the wife was induced to execute the mortgage from fear excited by threats made to her by the creditor of an illegal criminal prosecution against her husband, the instrument thus obtained will not be binding upon her."

This case settles the question as to the necessity that a prosecution should have been actually commenced in order to establish duress, but does not touch the point presented here, as to whether duress can be predicated on threats of a lawful arrest and prosecution. It appears from the testimony of Niggley himself that he was guilty of the offences for which he was threatened with prosecution, and the duress consisted mainly, if not entirely, in the fears excited in the mind of the defendant by threats of such prosecution. There are many cases holding that the threat of a lawful arrest does not constitute duress in such sense as to discharge the person threatened from liability on a contract which he has been induced to sign by means of such threats. Nealley *v.* Greenough, 25 N. H. 325; Compton *v.* Bank, 96 Ill. 301; Eddy *v.* Herrin, 17 Me. 339; Clark *v.* Turnbull, 47 N. J. L. 265; Mundy *v.* Whittemore, 15 Neb. 647; Sanford *v.* Somborger, 26 Neb. 295. For other cases, see 6 Am. & Eng. Encyc. of Law, p. 64, *et seq.*

We have examined a great number of cases declaring this doctrine, in all of which it appeared that the threat made was

of a prosecution for the particular matter for which payment or settlement was sought. In many of the older cases, as well as in some of the later ones, the arrest threatened was on process issued or to be issued in a civil action for the collection of the plaintiff's demand. In this case, the threats made were of a prosecution for offences in no wise connected with Summers's claim. The facts that Niggley was guilty of violations of the law of the State, and that Summers, his attorney and friends knew of the facts showing his guilt themselves, and were witnesses to the unlawful sales of liquor, were used as a menace to drive Niggley into a settlement of Summers's claim. The Court of Appeals of New York expressly denies the doctrine that the threat must be of an unlawful arrest. In Adams *v.* National Bank, 33 N. E. Rep. 7, it was held, "that money paid by a wife in settlement of her husband's debt, upon the threat by the creditor to arrest the husband if the debt was not paid, may be recovered back, though there was lawful ground for arresting the husband." The case of Schoener *v.* Lesseaur, 13 N. E. Rep. 741, also holds that duress may be exercised through threats of prosecution for an offence of which the party is actually guilty. See, also, Johnson *v.* Zuschlag, 34 Tex. 371; Taylor *v.* Jacques, 106 Mass. 291; Davis *v.* Luster, 64 Mo. 43. In Seiber *v.* Price, 26 Mich. 522, it was said:

"An arrest by a legal warrant on a criminal charge, to compel the satisfaction of a mere private civil demand, is a misuse of process, a fraud upon the law, and an illegal arrest, as respects the party who knowingly and purposely perverts the machinery of the law in that way. And papers obtained under the pressure of such a proceeding by the party promoting it are at least voidable as against him, at the election of the party thus constrained to make them."

Summers clearly had no right to make use of his knowledge of the guilt of Niggley to force him to settle his demand. The jury have found that it was the threats and fear of their being carried into execution that caused Niggley and his wife to yield to Summers's demand and execute the note and mortgages in question, thus encumbering their homestead to the amount of $1250. If in this case the only threats used were those of prosecution for the shooting, the cases cited by plaintiffs would be more strictly in point.

We are not inclined to encourage a resort to such pressure as was used in this instance to compel the settlement of private demands. Neither Summers nor his friends had any right whatever to agree to abstain from prosecuting Niggley for any offence he had in fact committed, and while in this case there

is no showing of an agreement on their part to abstain from such prosecutions, or to withhold evidence within their knowledge, they impliedly held out the hope that, if Niggley yielded to Summers's demand, he would not be troubled with the criminal charges. Under the facts disclosed by the testimony, it would appear that Summers had a valid claim against Niggley for damages, which he had a right to prosecute in Court if he failed to obtain settlement otherwise, but he had no claim to security on Niggley's homestead, nor could he by any legal proceeding have compelled Mrs. Niggley to relinquish her rights thereto. This action, being founded wholly on the instruments obtained by duress, could not be maintained if brought by Summers. The acknowledgments of the mortgages were taken by Thompson, one of the plaintiffs in the case, who claims as assignee of Summers, and it appears from the testimony that he came into the room where the instruments were executed, and was informed of sufficient facts to at least put him on inquiry, if not to fully apprise him of what had been done. It is not seriously contended that the plaintiffs were innocent purchasers of the note.

As the charge of the Court was substantially in accord with the views hereinbefore expressed, and as the jury found explicitly in favor of the defendants upon the question of duress, we think no error appears in the instructions. We have also examined all the rulings of the Court as to the admissibility of evidence to which attention is called in the brief, but find no material error there. Under the issue presented, the exclusion of the evidence of Doctor Humphreyville, as to the extent and character of the injury sustained by Summers, was immaterial. If this were an action between Summers and Michael Niggley to recover damages for the injury, the evidence might be material, but this is a case to which Summers is not a party, and which is founded solely on written instruments. The plaintiffs must stand or fall by them alone. We perceive no substantial error in the record, and the judgment is affirmed.

All the Justices concurring.

THE CITY NATIONAL BANK OF DAYTON, O., RESPONDENT, *v.* KUSWORM, APPELLANT.

IN THE SUPREME COURT OF WISCONSIN, JUNE 2, 1894.

[*Reported in* 88 *Wisconsin* 188.]

APPEAL from the Circuit Court for Dane County.

The plaintiff is a banking corporation, organized and existing under and by virtue of the laws of the United States, and located at Dayton, O., and brings this action to recover the amount due upon a promissory note, of which the following is a copy, to wit:

"$4900. CHICAGO, November 2, 1892.

"On demand, for value received, I promise to pay to the order of City National Bank the sum of $4900, at Chicago, with interest at the rate of 6 per cent per annum after date, having deposited with said City National Bank, as collateral security, my equity of six thousand dollars ($6000), in a note of Frank M. Stringfield and Sarah Agnes Stringfield for $12,000, dated October 7th, 1892, due sixty days after date, payable to the order of themselves and endorsed, together with the security of a trust deed to Abram L. Stone, recorded in book 3082 of records of Cook County, on page 146, which I hereby give the said City National Bank, its agents or assignee, authority to sell, or any part thereof, on the maturity of this note or at any time thereafter, or before in the event of said security depreciating in value in the opinion of said City National Bank, at public or private sale, at the discretion of said City National Bank or its assignee, without advertising the same or demanding payment or giving me any notice, and to apply so much of the proceeds thereof to the payment of this note as may be necessary to pay the same, with all the interest due thereon, and also to the payment of all expenses attending the sale of the said note and trust deed, including attorney's fees; and in case the proceeds of the sale of the said note and trust deed shall not cover the principal, interest, and expenses, I promise to pay the deficiency forthwith after such sale.

"MOLLIE KUSWORM."

The plaintiff prayed judgment accordingly.

The defendant answered the complaint, and in effect alleged: First, that the note was obtained from her without any valuable

consideration therefor, through the fraud of the plaintiff's agent ; second, that it was given to compound a felony ; third, that it was given under duress of threats to prosecute the defendant's husband, then very sick, and who died soon thereafter, for the crime of forgery, and in consideration of the suppression of documentary proof of his guilt.

The Court having ruled that under the pleadings the defendant was entitled to the opening and closing of the case, the defendant took the burden of the defence. At the close of the testimony on the part of the defendant, the Court was asked to direct a verdict in favor of the plaintiff for the amount of the note and interest. Before the decision of that motion, the defendant's counsel asked leave to amend the answer by setting up the disposition of the notes surrendered by Gebhart, her ignorance as to what was done with them by her husband, and her willingness to produce and restore the same to the plaintiff so far as she was able so to do ; and further alleging that the defendant was a non-resident of the State of Wisconsin, which amendment was disallowed by the Court, except as to the allegation of the defendant's non-residence. In determining the motion for an order directing a verdict in favor of the plaintiff, the Court said : " As far as the question as to the power of making this contract on the part of the defendant, Mrs. Kusworm, is concerned, I am of the opinion, as I ruled once before this term, that that power exists, even under the laws of the State of Wisconsin ; and I must say that, as to that point, I think that the contract is a binding one upon the defendant. As to the defence interposed, that the transaction by which this note was given was compounding a felony, I think the proof clearly shows that no such compounding was then made by the parties—that is, that the elements which constitute the compounding of a felony were absent in the dealings. As to the other point of the defence, that of duress, the proof is undisputed but what matters occurred there tending to show that there was some duress or compulsion practised on the part of the officer of the bank toward this woman. But to entitle the defendant to recover on that, I think she must, as a matter of law, offer full restitution to the plaintiff, and, not having done so, I must direct a verdict for the plaintiff. The defendant admits the making of the note and the amount. So a verdict for the plaintiff is directed for the principal sum, with interest thereon as specified in the note ;" to wit, for the sum of $5157.25.

From the judgment entered in accordance with the verdict so directed the defendant appeals.

For the appellant there was a brief by *Bashford, O'Connor, Polleys & Aylward*, and *Moran, Kraus & Mayer*, and oral argument by *R. M. Bashford.*

For the respondent there was a brief by *Charles Noble Gregory*, attorney, and *L. P. Conover* and *S. S. Gregory*, of counsel, and a supplemental brief by *S. S. Gregory*, of counsel ; and the cause was argued orally by *Charles Noble Gregory.*

CASSODAY, J. The execution of the note in suit having been admitted, the plaintiff offered no evidence. On the part of the defendant the evidence, in effect, tends to prove : That on and for some time prior to November 1st, 1892, the plaintiff held two promissory notes which it had received from the defendant's husband, Moses Kusworm, each of which was signed, "M. Kusworm," one being for $4100 and the other being for $800, making an aggregate indebtedness of $4900, for money loaned by the plaintiff to him ; and that the same were secured by four, five, or six other notes, purporting to be executed by other parties, aggregating in amount seven or eight thousand dollars, as collateral security for the payment of such indebtedness of $4900. That in the forenoon of November 1st, 1892, one Gebhart, agent for the plaintiff, having both of said notes, and also said notes so held as collateral, in his possession, called on the defendant and requested to see her husband. That she told him her husband was very sick. That he said it made no matter, that he must see him, that her husband had borrowed $4900 from the plaintiff bank, and that he had come there to either get the money or security. That she then obtained permission from the nurse for Gebhart to see Mr. Kusworm. That Gebhart then had an interview with Mr. Kusworm in his room alone, neither she nor the nurse being present ; that, finally, Mr. Kusworm called the defendant, and she went into his room. That Mr. Kusworm then told her to put on her coat and hat, and go with Mr. Gebhart to Mr. Stone's house, and secure Gebhart for $4900 on the mortgage of $12,000 in which the defendant had an equity of $6000, the other $6000 of which belonged to Stone, a cousin of Mr. Kusworm. That Gebhart then told her that he had notes with him for $4900 which her husband had forged ; that he would have the Pinkerton detectives take her husband back to Ohio and put him in the hospital until he was able to go to jail, and would then put him in prison. That she protested, on account of her husband's dying condition, and that it would rob her home and her two little children of a father. That she almost fainted. That Gebhart then said, "No matter ;" that he had come as agent of the bank, and must fulfil his duty ; that he must either take Mr.

Kusworm back to Ohio or she must take up these notes which Mr. Kusworm had forged. That thereupon she and Gebhart took a cab and drove to the office of the plaintiff's attorney, and that the attorney then got into the cab and they all drove to the house of Stone. That Stone was not at home, and so she left a note, requesting him to call at the attorney's office at 3 o'clock that afternoon. That she then returned to her home and found her husband under the effects of a sleeping powder, but she was cautioned by the nurse not to speak to him for fear that he might die from the effects. That the defendant was in a very delicate condition and weak at the time, having been in the family way for more than three months, but that she managed to get back to the attorney's office at the time appointed. That she found Gebhart and his attorney there, but Stone did not arrive until some minutes afterward. That Gebhart at once repeated his threats. That when Stone came she introduced Gebhart to him as the man who claimed that her husband had forged notes to the amount of $4900, and that he had come there to secure the debt Mr. Kusworm was liable for, or take him back to Ohio. That she said that, in order to prevent her husband from being taken back to Ohio and prosecuted, she was willing to turn over her equity in the mortgage mentioned to secure the plaintiff. Stone stepped out and got the mortgage, and returned with it in a few minutes, and thereupon Gebhart and his attorney took the matter under advisement, with an agreement that she and Stone, respectively, would meet them at the same office the next morning at 11 o'clock. That she was compelled to wait in the rain for a long time for the cable cars. That she got home about 8 o'clock in the evening. That she found her children waiting, and her husband scarcely able to open his eyes. That she retired without eating anything, and spent a sleepless night. That, upon returning to the attorney's office the next morning, she found Gebhart and Stone there. That Gebhart refused to accept the security she had offered, for the reason that Stone's part of the mortgage was prior to hers. That Gebhart finally offered to accept the security if Stone would agree in writing to prorate with the plaintiff in the mortgage. That Stone at first refused. That Gebhart then repeated his threats, and the defendant cried and begged of Stone to consent and thus save her husband, and that he would lose nothing by it; and thereupon Stone consented and signed the agreement, and the defendant signed the note in suit. That Gebhart then handed an envelope to Stone, supposed to contain the note of $800 and the note of $4100, each signed "M. Kusworm," and also the notes to the aggregate

amount of seven or eight thousand dollars held by the plaintiff as collateral thereto, and that Stone thereupon, and in the presence of Gebhart, handed the envelope with the notes therein to the defendant with direction to give them to her husband. That the defendant took the envelope with the notes therein from Stone, and delivered them to her husband as so directed. That she did not examine the notes in the office, and never saw them thereafter, and had no knowledge as to where they were. That she had no conversation with Stone, and did not see him on either of the days mentioned except in the presence of Gebhart and his attorney. That Stone did not see Mr. Kusworm on either of those days, and had not seen him for several weeks before, and did not see him for several weeks afterward. That the only connection Stone had with the matter was by reason of his owning a part of the mortgage as mentioned. That the defendant did not know what her husband had done with the notes. That he died December 5th, 1892, and she was the executrix of his will. That she had looked over her husband's papers, but had never found the notes.

The defendant positively swears that she never signed the $800 note nor the $4100 note, and that she never authorized her husband to sign either of those notes or any notes ; but on her cross-examination a power of attorney was presented, bearing date September 18th, 1891, and which she admits to have been signed by her, authorizing her husband to sign and endorse notes ; and it is contended on the part of the plaintiff that Mr. Kusworm signed the $800 note and the $4100 note respectively, "M. Kusworm," meaning thereby the defendant, Mollie Kusworm, instead of Moses Kusworm. Whatever may be the fact in that regard, yet the evidence in the record is very strongly against any such contentions. There is no evidence that either of those notes was signed by an agent instead of the principal. There is no evidence that Gebhart at any time during any of the several interviews mentioned claimed or pretended that the defendant was the maker of either of those notes, nor that the defendant was, at any time before the making of the note in suit, in any way indebted to the plaintiff, nor that he was there seeking security for any indebtedness of the defendant. Since the verdict was directed for the plaintiff, we must, for the purposes of this appeal, assume that the $800 note and the $4100 note were each signed "M. Kusworm" by Moses Kusworm, as and for his own signature, and not as and for the signature of his wife.

There is no evidence that Mr. Kusworm actually forged any note, but simply that Gebhart charged him with having forged

the notes, as mentioned. It is true that the defendant testified to the effect that Gebhart claimed that he had forged notes in the amount of $4900 ; but, from the whole evidence, it is very apparent that the real charge made by Gebhart was to the effect that Mr. Kusworm had forged sundry names to the four, five, or six notes, aggregating seven or eight thousand dollars, which the plaintiff held as collateral security for his indebtedness to the plaintiff bank, as mentioned. Upon such evidence the trial court directed a verdict in favor of the plaintiff and against the defendant. The correctness of such ruling is the only question here for review.

Manifestly the defendant cannot avoid paying the note upon the mere ground that it was given to compound a felony. Catlin *v.* Henton, 9 Wis. 476 ; Schultz *v.* Catlin, 78 Wis. 611. The only defence available, if any, would seem to be that the defendant was prevailed upon to give the note in suit by duress. As a general rule the defence of duress is not available in an action upon a note given to prevent the criminal prosecution of another person. To this rule there are certain well-established exceptions. Among other exceptions, a wife may avoid her contract, otherwise valid, by reason of a threatened criminal prosecution of her husband, and conversely ; and so a father may avoid his contract by reason of a threatened criminal prosecution of his son, and conversely. Thus in Bayley *v.* Williams, 4 Giff. 638, affirmed Williams *v.* Bayley, L. R. 1 H. L. 200, a son forged his father's name, as endorser, upon certain promissory notes, and obtained money thereon from his bankers. The fact of the forgeries having been discovered, which the son did not deny, the bankers, without any direct threat of any prosecution, insisted upon a settlement, to which the father was to be a party. The father consented, and agreed in writing to make an equitable mortgage of his property to secure his son's indebtedness ; and it was held that the father was not a free and voluntary agent in the making of such agreement, and hence that the same was invalid. The threatening language to the father in that case was : " If the bills are yours, we are all right. If they are not, we have only one course to pursue ; we cannot be parties to compounding a felony. It is a serious matter. It is a case of transportation for life." This is exceedingly mild when compared with the language addressed to Mrs. Kusworm, and yet, in the opinion of Lord Westbury in that case, it is said : " I regard this as a transaction which must necessarily, for purposes of public utility, be stamped with invalidity, because it is one which undoubtedly, in the first place, is a departure from what ought to be the principles of fair deal-

ing between man and man ; and it is also one which, if such transactions existed to any considerable extent, would be found productive of great injury and mischief to the community." The same principle has frequently been applied in avoiding contracts made to prevent the criminal prosecution of a parent or child, a husband or a wife, not only in England, but in this country. Whitmore *v.* Farley, 43 Law T. (N. S.) 192, affirmed 45 Law T. (N. S.) 99 ; Seear *v.* Cohen, 45 Law T. (N. S.) 589 ; McClatchie *v.* Haslam, 63 Law T. (N. S.) 376 ; Harris *v.* Carmody, 131 Mass. 51 ; Foley *v.* Greene, 14 R. I. 618 ; Coffman *v.* Lookout Bank, 5 Lea, 232 ; First Nat. Bank *v.* Bryan, 62 Iowa, 42 ; Southern Exp. Co. *v.* Duffey, 48 Ga. 358 ; Nat. Bank *v.* Kirk, 90 Pa. St. 49 ; Jordan *v.* Elliott, 12 Wkly. Notes Cas. 56 ; Sharon *v.* Gager, 46 Conn. 189 ; McMahon *v.* Smith, 47 Conn. 221 ; Central Bank *v.* Copeland, 18 Md. 305 ; Tapley *v.* Tapley, 10 Minn. 448 ; Meech *v.* Lee, 82 Mich. 274 ; Eadie *v.* Slimmon, 26 N. Y. 9 ; Osborn *v.* Robbins, 36 N. Y. 365 ; Adams *v.* Irving Nat. Bank, 116 N. Y. 606 ; Schultz *v.* Culbertson, 46 Wis. 313 ; s. c. 49 Wis. 122 ; Schultz *v.* Catlin, 78 Wis. 611. Upon these adjudications and the evidence before us, it is very clear that the note upon which this action is brought was obtained from defendant by duress, and is for that reason void.

It is contended, however, that duress is a species of fraud, and that the defendant cannot rescind the contract for duress without first restoring to the plaintiff the benefits secured by making the contract. It is undoubtedly true that, if a party invokes the aid of equity to set aside a contract by virtue of which he has received a benefit, he will be required to restore such benefit as a condition of obtaining such relief. This is upon the familiar principle of estoppel *in pais*. Thus, where a party affirms a contract in part, he is thereby estopped from disaffirming it as to the residue. "It is a doctrine," said Nelson, J., "when properly understood and applied, that concludes the truth in order to prevent fraud and falsehood, and imposes silence on a party only when in conscience and honesty he should not be allowed to speak." Van Rensselaer *v.* Kearney, 11 How. 326. "In short and in popular language," said Wilde, B., "a man is not permitted to charge the consequences of his own fault on others, and complain of that which he has himself brought about." Swan *v.* North British Australasian Co., 7 Hurl. & N. 633. "The doctrine of estoppel *in pais* always presupposes error on one side and fault or fraud upon the other, and some defect of which it would be inequitable for the party against whom the doctrine is asserted to take advantage." Morgan *v.* Railroad Co., 96 U. S. 716.

The question recurs whether, upon the principles stated, the defendant has done anything to estop her from defending against the note in suit. She is not here invoking the aid of a court of equity. She is simply resisting the enforcement of an executory contract on the ground that her signature to the same was procured by duress. As indicated, her defence, as appears from the record, is complete, unless her conduct has been such as to render it inequitable for her to make it. It certainly cannot be said as a matter of law, upon the record before us, that the defendant received any pecuniary benefit or consideration for signing the note in suit, or that she was in any way liable upon or on account of any of the notes surrendered by the plaintiff at the time she signed that note. If the evidence before us is true, then she signed that note for the sole purpose of saving her sick husband from arrest, prosecution, and imprisonment. The envelope containing the notes of $800 and $4100, each signed "M. Kusworm," and the collaterals thereto, was not delivered by Gebhart to the defendant, but to Stone. Stone thereupon, in the presence of Gebhart, handed the same to the defendant, with the direction that she deliver the same to her husband. In pursuance of such direction she did deliver the same to her husband. If the evidence in the record is true, then that is all she ever saw of, or had to do with, that envelope or any of the notes thus contained therein. There is no evidence in the record that the defendant exacted, as a condition of her signing the note in suit, that Gebhart should surrender to her any of the notes so contained in that envelope, or that there was any agreement or understanding to that effect. Stone was a cousin of Mr. Kusworm, and apparently his friend ; but there is no evidence that he was his agent, or had any authority to act for him, much less that he acted as the agent of the defendant. What he did in the matter was purely voluntary on his part, and as the result of his owning a mortgage with the defendant, as mentioned. Upon the evidence before us, the legal effect of the transaction seems to be no different than it would have been had Mr. Kusworm been present and Gebhart had delivered the envelope with the notes therein directly to him. Suppose such had been the facts, and Mr. Kusworm had immediately, in the presence of Gebhart, thrown the notes contained in the envelope into the fire and burned them up, would the defendant thereby have been estopped from making the defence of duress ? In some of the cases cited the wife signed the contract by the duress of her husband ; nevertheless, it was held that her defence of duress was available.

There can be no such thing as estoppel *in pais*, except by

reason of something said or done by the person estopped ; certainly not by the independent act of another person, even though such other be her husband. The mere fact that the defendant delivered the package to her husband, as directed in the presence of and acquiesced in by the plaintiff's agent, does not make it inequitable for her to resist the enforcement of an executory contract which she signed only by reason of the plaintiff's duress. It is a well-recognized principle of law that, where a loss must be borne by one of two innocent persons, it shall be borne by him who occasioned it. Karow *v.* Continental Ins. Co., 57 Wis. 61, and cases there cited. If the two parties were equally innocent, yet if the notes contained in the envelope were destroyed by Mr. Kusworm without the privity of his wife, then it was in consequence of Stone's direction, with Gebhart's consent, that they should be delivered to him, and not that the defendant was the mere instrument of making such delivery. But the parties were not equally innocent. On the contrary, as appears from the evidence, the defendant was the victim of very cruel duress on the part of the plaintiff.

There seems to be a dearth of authorities upon the precise question here presented. In some of the numerous cases cited, and especially those in equity, restoration was made or tendered or made a condition of the judgment, while in others the question is not mentioned. In Jordan *v.* Elliott, 12 Wkly. Notes Cas. 56, the victim of the duress was induced to sign a receipt acknowledging the surrender of her son's note and a policy of insurance on his life held by Jordan as collateral thereto, which he assigned to the defendant. Jordan burned the note in the presence of the defendant, but left the policy and the assignment thereof at her house. Of course there could be no restoration of the note, and it does not appear that the policy was restored ; but the Supreme Court of Pennsylvania affirmed the judgment in favor of the mother. There are numerous cases where duress or fraud has been made available as a defence or the ground of recovering back money paid or setting aside contracts executed, without restoration. Foss *v.* Hildreth, 10 Allen, 76 ; Manning *v.* Albee, 11 Allen, 520 ; Kent *v.* Bornstein, 12 Allen, 342 ; Chandler *v.* Simmons, 97 Mass. 508 ; Brewster *v.* Burnett, 125 Mass. 68 ; Morse *v.* Woodworth, 155 Mass. 233 ; Higham *v.* Harris, 108 Ind. 246 ; Baldwin *v.* Hutchison (Ind. App.), 35 N. E. Rep. 711 ; Dimmitt *v.* Robbins, 74 Tex. 441 ; Brown *v.* Peck, 2 Wis. 261. In some of these cases there was a failure to return a release of a claim, or a discharge of a former suit ; in some, a failure to return a note and worthless securities ; in some, a failure to return counterfeit bills ; in some, a

failure to restore money paid to a minor and by him wasted ; in some, a failure to restore money or property paid or delivered to some person other than the victim of the duress or fraud. The rule seems to be stated fairly well by the late Mitchell, J., of Indiana, in one of the cases cited, as follows : " If the results of a contract or settlement by which a party is sought to be estopped, or which is set up to prevent the assertion of a right, are such as to be of no benefit to one, or no detriment to the other, contracting party—that is, if nothing of value was parted with on the one hand or received on the other —the contract may be disaffirmed without a formal restoration, on the principle that the law does not require an idle ceremony." Higham *v.* Harris, 108 Ind. 246, 254. Here the defendant received for herself no pecuniary benefit or thing of value. Should it be made to appear upon a trial that the defendant, as executrix of her husband's estate, actually received the notes contained in the package, or otherwise became a party to the destruction or conversion of them, a different question would be presented.

By the Court. The judgment of the Circuit Court is reversed, and the cause is remanded for a new trial.

Winslow, J. The importance of the principle involved in this case prompts me to state briefly the reasons why I cannot concur in the conclusions of the majority of the Court. The evidence in the case is entirely insufficient to show that the note in suit was given to compound a felony. The only defence which the evidence tends to prove is that the note was given by the defendant under duress of threats of imprisonment of her husband. That an executory contract may be avoided or rescinded which has been made under the influence of such duress as the evidence here tends to prove is quite well established, and I shall spend no time on that question. The avoidance or rescission in such a case stands on the same ground as avoidance or rescission of a contract induced by fraud. Duress is, in fact, a species of fraud. Cooley, Torts (2d ed.), 592 ; Reynolds *v.* Copeland, 71 Ind. 422 ; 6 Wait, Act. & Def. p. 663, § 12. Logically and necessarily, the same conditions will be imposed in a case of duress as in a case of the more common kinds of fraud. One of these conditions universally insisted upon is that the defrauded party must return or offer to return the consideration, if any has been received, or its equivalent in case return of the specific consideration be impossible. Citation of authorities on this proposition seems unnecessary, and I content myself with one case in this Court, where the rule is well stated, with authorities. Van Trott *v.* Wiese, 36 Wis.

439–448. I know of no exception to this rule, at least as applicable to persons of full age and mental competency. It is true that where a consideration has been received which is worthless or represents nothing of value, its return will not be required, because such return would be a mere idle ceremony. This is not an exception, in fact, to the rule, but rather a demonstration of the existence of the rule itself, because in such cases failure to return the consideration is always excused by the courts on the very ground that there is practically nothing to be returned, thus emphasizing the general rule. With deference, I say that most of the cases relied upon in the majority opinion as justifying the decision in this case are cases where the return of the consideration was excused because it was absolutely worthless.

In Foss *v.* Hildreth, 10 Allen, 76, the party who was seeking to avoid a contract induced by fraud and duress did not return a discharge of a groundless action pending against him, and the Court says that such return was not necessary, because "the discharge is not property of any value to the defendant, nor is it of any use to the plaintiff." It appeared in that case, also, that the plaintiff made the voidable contract while intoxicated, and the Court remarks that, where a person *non compos* makes a deed and receives a valuable consideration for it, he may avoid it without first returning the consideration. Manning *v.* Albee, 11 Allen, 520, was an action of replevin for a quantity of clothing which Manning had been induced to trade to one French in exchange for French's promissory note, with certain bonds as collateral. The bonds were represented as very valuable, but were in fact worthless. Albee afterward took possession of the clothing, claiming to have bought it of French, and French disappeared. Manning then ascertained that the bonds were worthless, and brought replevin for the goods against Albee, French not being found. The objection was made that the action could not be maintained without surrender of the note and bonds, but the Court holds that to be unnecessary, because it appeared that French could not be found, so that the tender to him was impossible, and the defendant was in no event entitled to them. In Kent *v.* Bornstein, 12 Allen, 342, the return of a counterfeit bill was held unnecessary, because it was entirely worthless. In Chandler *v.* Simmons, 97 Mass. 508, it was held unnecessary for a minor, in avoiding his deed made during infancy, to return such part of the consideration as he has wasted or spent during minority, but the decision is placed upon the express ground that the consideration had been spent during minority, and the principle

is recognized that, if he retained the consideration after becoming of age, he would affirm the contract. In Brewster *v.* Burnett, 125 Mass. 68, the return of counterfeit bonds was not required, because they were entirely worthless. In Morse *v.* Woodworth, 155 Mass. 233, the plaintiff was not required to return a release given by defendant, because it was not property, and after rescission it became of no effect. In Higham *v.* Harris, 108 Ind. 246, it is held that, "if nothing of value was parted with on the one hand or received on the other, the contract may be disaffirmed without a formal restoration, on the principle that the law does not require an idle ceremony." In Baldwin *v.* Hutchison (Ind. App.) 35 N. E. Rep. 711, the return of an agreement not to prosecute the plaintiff was held unnecessary, because it was "wholly valueless." The case of Dimmitt *v.* Robbins, 74 Tex. 441, was a case where Dimmitt was attacked by armed robbers, who demanded a ransom. Robbins, who was present, pretended to give the robbers $2500 in an envelope for Dimmitt's release, and afterward sued Dimmitt for the $2500 as for money loaned. A judgment in favor of Robbins was reversed, because the evidence did not show that the envelope contained $2500, and further, because the evidence showed that Robbins was a confederate of the robbers, which fact rendered void any contract such as claimed by Robbins. In Brown *v.* Peck, 2 Wis. 261, Brown was excused from returning the $100 which it was claimed he had received, because in fact he never received it. The Court says: "There was, in fact, no valid, legal payment made, nor any received." The money was left in the hands of one Leland, and never came into the possession of Brown.

The foregoing cases seem to be relied upon in the opinion of the Court as justifying in some way the proposition that a contract may be rescinded without return of the consideration. As a matter of fact, it is apparent that not one of them sustains the proposition that, where anything of value has been received under a contract, rescission can be had without return of such value, except, perhaps, in the case of a minor or a person *non compos mentis*. The case of Jordan *v.* Elliott, 12 Wkly. Notes Cas. 56, is still more unfortunate as an authority. It is said in the majority opinion that in that case a policy of insurance, and the assignment thereof, were left at defendant's house, and that it does not appear that the policy was restored. My reading of this case convinces me that the defendant never received anything. It is true she signed a receipt acknowledging that she had received her son's note and policy of life insurance and assignment thereof, but the opinion of the Court expressly

holds that this receipt was obtained by fraudulent representa tions as to its contents, and that at the same time the defendant refused "to receive either the note or the policy;" and in another place they are referred to as a "valueless consideration, which she (defendant) refused to accept." How this case supports the view of the majority of the Court I leave for others to say.

In the present case there is absolutely no question but that Mrs. Kusworm received from the bank, in consideration of her note and mortgage, a large amount of negotiable securities. According to the testimony of the witness Stone (which is uncontradicted), Mr. Gebhart handed to him (Stone), when he received Mrs. Kusworm's note, two notes of $4100 and $800 respectively, signed "M. Kusworm," together with four or five collateral notes signed by other persons and aggregating seven or eight thousand dollars, which were collateral to the M. Kusworm notes. All of these notes Mr. Stone immediately passed over to Mrs. Kusworm. There was no claim or proof that all of the notes were forged or worthless. The utmost claim made by Gebhart was, according to Mrs. Kusworm's own testimony, "I have notes here for $4900, which your husband has forged." Granting this to be true, there were still notes aggregating seven or eight thousand dollars, which were genuine and valuable securities, which passed into Mrs. Kusworm's hands as a consideration for the notes which she now seeks to avoid. The effect of the decision of the Court is that she may avoid her own contract without accounting for or returning the consideration thereof, and without showing it to be worthless. I think this is contrary to all the law on the subject. It is said that she received no pecuniary benefit from it, because she turned all the notes over to her husband. Still, the bank parted with it, and, according to the rule laid down by Mitchell, J., quoted with approval in the majority opinion, in order to justify rescission without restoration, there must have been "nothing of value parted with on the one hand or received on the other." But there was value received by Mrs. Kusworm. The fact that she turned them over to her husband, according to Stone's advice, surely cuts no figure. Stone was not the agent of the bank in any sense. He was simply the friend of Mrs. Kusworm. The sum and substance of the matter is that she voluntarily, on the advice of a friend, turned the notes over to her husband, and thus disabled herself from returning them. Was it ever held that a person, by voluntarily destroying a consideration received or placing it in the hands of a third party, could relieve himself from the necessity of returning it or its value in case of

rescission? I have yet to see the case which holds such a doctrine. There seems to me no element of estoppel here as against the bank resulting from the fact that Gebhart heard Stone direct Mrs. Kusworm to turn over the notes to her husband, and said nothing. The notes had passed entirely beyond the bank's control. Gebhart had received Mrs. Kusworm's note and mortgage as full and complete satisfaction for the bank's right and interest in them. She could do as she pleased with them, and the bank could say neither yea nor nay. There was no duty then resting upon Gebhart to speak, and consequently no estoppel from his failure to speak.

The net result seems to be, from the conclusions reached by the Court, that the plaintiff loses, without possibility of recovery, the notes of M. Kusworm, and the collaterals which it lawfully held thereto, as well as the note and mortgage of Mrs. Kusworm. Against such a result I respectfully protest.

PINNEY, J., concurs in the above opinion by WINSLOW, J.

THE OREGON PACIFIC RAILROAD COMPANY, APPELLANT, *v.* GEORGE J. FORREST ET AL., AS EXECUTORS, ETC., RESPONDENTS.

IN THE COURT OF APPEALS OF NEW YORK, JUNE 16, 1891.

[*Reported in* 128 *New York Reports* 83.]

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made May 23d, 1890, which affirmed a judgment in favor of defendant, entered upon a verdict directed by the Court.

The nature of the action and the facts, so far as material, are stated in the opinion.

Joseph H. Choate for appellant.

Horace Russell for respondents.

EARL, J. This action was brought against the executors of Cornelius K. Garrison to recover the possession of 100 first mortgage bonds issued by the plaintiff, of which it claims to be the owner and entitled to the immediate possession. It is alleged in the complaint that the plaintiff on or about October 1st, 1887, duly demanded of the defendants the delivery to it of the bonds, and that the defendants had failed and refused to deliver the same, or any of them to it; and relief is prayed

that the defendants may be adjudged to deliver to the plaintiff the bonds, or that it may have judgment for $202,500, in case a delivery cannot be had, together with its damages and costs. The answer put in issue the plaintiff's right and title to the bonds, and claimed that the defendants were entitled to hold and possess the same under an agreement between it and their testator, made on or about August 13th, 1881.

The material facts are as follows: On June 13th, 1881, the plaintiff and Cornelius K. Garrison entered into a contract, under seal, by which Garrison agreed to purchase 5000 tons of English steel rails, deliverable in San Francisco at as early a day as reasonably practicable, and agreed to sell and deliver to the plaintiff the rails so bought upon arrival there of each shipment upon receiving in cash the actual cost to him of the rails and the further sum of $100,000 in the first mortgage bonds of the plaintiff, and he agreed to furnish the necessary fish-plates, bolts, nuts, spikes and fittings for the rails, deliverable in San Francisco at the same time with the rails, and sell and deliver the same to the plaintiff upon the arrival of each shipment at that place at the net cost to him. And it agreed to purchase from him the rails, fish-plates, bolts, nuts, spikes and fittings upon arrival of each shipment at San Francisco, and pay for the same in cash and bonds as provided. It also agreed to deposit with Garrison, as a guarantee for the performance of the agreement on its part, 3000 of its first mortgage bonds for $1000 each, 100 of which bonds he was to retain, and he was to hold the remaining 2900 bonds until it had taken and paid for the rails, fish-plates, etc., in full, including interest and all proper charges, provided that it might withdraw any part of the bonds upon paying to Garrison 60 per cent of their par value. It further agreed to give to Garrison the same bonus in its full-paid stock upon the 100 bonds that he was to retain that he would be entitled to *pro rata* with the most favored purchaser of any of its bonds. Garrison was also to loan to it an amount equal to the difference between the cost to him of the rails, fish-plates, etc., and $200,000, the bonds deposited with him being held as security for such loan; and it agreed to purchase from Garrison the 100 bonds mentioned, together with their *pro rata* of stock, and pay him therefor $100,000 at any time he might elect to sell the same to it. In pursuance of that contract the 3000 bonds were delivered to Garrison, and he thus became obligated to furnish the steel rails, fish-plates, etc., as provided. It appears in evidence that these rails were expected to be purchased, and that they could only at that time be purchased in England, and that they were to be shipped

from that country by vessels to San Francisco. The negotiations in reference to the agreement and its performance were conducted mainly between Mr. Hogg, the president of the plaintiff, and Cornelius K. Garrison and W. R. Garrison, his son and general agent. English steel rails were easily purchasable in England in the summer of 1881, but it was difficult to get steamers to transport them to San Francisco. Cornelius K. Garrison died on May 1st, 1885, and W. R. Garrison died on July 1st, 1882 ; and this action was commenced on October 1st, 1887, and the only person then living who had personal acquaintance with the main facts out of which the plaintiff's alleged cause of action arose was Hogg, who was its main witness upon the trial.

It appears that on July 21st, 1881, the plaintiff received back from Garrison 400 of the bonds referred to in the agreement, but for what cause or upon what consideration they were surrendered by Garrison to it does not appear. The evidence tends strongly to show that during the two months after the execution of the contract, Garrison did very little, if anything, toward its performance. It does not appear that he had purchased any rails or that he had made any effort to purchase any, or to procure vessels to transport the rails when purchased. It does appear that Hogg, on behalf of the plaintiff, from time to time, urged performance of the contract, and that finally about August 1st Hogg, on behalf of the plaintiff and upon credit furnished by him, purchased the rails. On August 13th he notified Garrison that he had purchased them, and he then claimed that Garrison had broken the contract with the plaintiff and that he should hold him responsible, and he then demanded the surrender of the balance of the bonds remaining in the hands of Garrison. He refused to surrender any of the bonds unless it consented that he should have the 100 bonds which he was entitled to under the contract, and threatened to retain all the bonds unless it would consent to surrender the 100. Thereupon there was a proposition from one of the parties to the other that the contract of June 13th should be cancelled and surrendered, and that Garrison should have and return 100 of the bonds upon surrendering the remainder thereof.

The by-laws of the plaintiff provided for an executive committee who should possess, and exercise by a majority of its members, all the powers and duties of the board of directors when the board was not in session ; and at a meeting of the executive committee held on August 13th, the president was authorized to negotiate with Garrison for the cancellation and abrogation of the contract existing between him and the plain-

tiff, and to close the transaction on the terms proposed, in his discretion. It will be observed that in the negotiations between Hogg and Garrison both parties acted upon the supposition that the contract of June 13th was in force, and the resolution of the executive committee recognized that contract as existing.

In pursuance of the authority thus conferred upon him, Hogg entered into the following agreement with Garrison :

" For and in consideration of one hundred thousand dollars in bonds of the Oregon Pacific Railroad Co. and six hundred shares full-paid stock (the receipt whereof is hereby acknowledged) paid by the Oregon Pacific R. R. to C. K. Garrison, the within agreement is hereby cancelled and satisfied, and the Oregon Pacific R. R. Co. hereby acknowledges the receipt of twenty-five hundred bonds of one thousand dollars each, being the remainder of the three thousand bonds mentioned in the agreement hereto annexed."

Thereupon the agreement of June 13th was cancelled, and Garrison surrendered to the plaintiff the remainder of the bonds, after retaining the 100 to which he was entitled under the agreement. It paid to Garrison and his assignee and his executors, after his death, the semi-annual interest coupons, the last being paid two days after the commencement of this action.

The plaintiff bases its right to recover these bonds upon the following grounds : First, that the agreement of August 13th, 1881, surrendering the bonds to Garrison, was without consideration and therefore void ; and, second, that the contract was invalid for having been obtained by Garrison through duress.

As to the first ground : This was an executed agreement, and there is authority for saying that it was valid without any consideration. In Bishop on Contracts, § 81, it is said : " Though a contract is without consideration, yet if it is voluntarily and with full knowledge of the facts executed, the property in the thing, whether money or a chattel, is transferred, and it cannot be reclaimed. So that a consideration is not an essential part of an executed contract." And so it was substantially held in Maxwell *v.* Graves, 59 Iowa, 613.

But it is not needful to go so far in this case. It is quite clear that, upon the facts as they now appear (and assuming that they all appear), Garrison could not have maintained an action against the plaintiff based upon the contract of June 13th, for the reason that he had failed to perform the same on his part. There was room, however, for a claim, on his part, that the contract was still in force, and that on August 13th he was still able to perform the same and to discharge the obligations

thereof. It does not appear that, down to that time, the plaintiff had made any formal demand for the performance of the contract, or had notified him that, in case he did not perform, it would regard the contract as at an end. Without giving him such a notification its president had, some two weeks before that time, made other arrangements for obtaining the rails, and on August 13th notified him that the plaintiff would hold him responsible for not performing his contract. He refused to assent to the nullification or cancellation of the contract of June 13th, unless the plaintiff would surrender to him 100 of the bonds in his possession, and for the purpose of procuring a cancellation of the agreement and the surrender by Garrison to it of the remainder of the bonds, it entered into the agreement of August 13th ; and the cancellation of the first agreement and the mutual release of the parties therefrom furnished ample consideration for the contract of August 13th. Bishop on Contracts, § 68 ; Cutter *v.* Cochrane, 116 Mass. 408 ; Rollins *v.* Marsh, 128 Mass. 116 ; Perry *v.* Buckman, 33 Vermont, 7 ; Delacroix *v.* Bulkley, 13 Wend. 75 ; White *v.* Hoyt, 73 N. Y. 505 ; Tice *v.* Zinsser, 76 N. Y. 549 ; McCreery *v.* Day, 119 N. Y. 1 ; Manufacturing Co. *v.* Bradley, 105 U. S. 175. In Cutter *v.* Cochrane, it is said : "An agreement to rescind a previous contract imports that, until it is rescinded, it is recognized by both parties as subsisting and binding. The rescinding of a previous contract containing mutual stipulations is a release by each party to the other. The release of one is the consideration for the release of the other, and the mutual releases form the consideration for the new promise, and are sufficient to give it full legal effect."

Therefore, taking into view all the evidence, we see no reason to doubt that the contract of August 13th surrendering the 100 bonds to Garrison was based upon a sufficient consideration.

As to the second ground upon which the plaintiff bases its action, to wit, that the contract of August 13th was invalid because it was procured from it by duress, and that the bonds were coerced from it by a threat on the part of Garrison that he would not deliver to it any of the bonds held by him unless the 100 bonds were surrendered to him, we have to say, a contract obtained by duress is not ordinarily void, but mere voidable, and it may be subsequently ratified and confirmed. Doolittle *v.* McCullough, 7 Ohio State, 299 ; Lyon *v.* Waldo, 36 Mich. 345. In 1 Parsons on Contracts (7th ed.), 446, it is said : "A contract made under duress is not, strictly speaking, void, but only voidable, because it may be ratified and affirmed by the party upon whom the duress was practised." In 1 Addi-

son on Contracts (Morgan's edition), 454, it is said : "Any agreement made under improper pressure is voidable. If a person having been constrained by duress to make a contract, afterward voluntarily acts upon it, he thereby affirms its validity and loses the right to avoid it." In Chitty on Contracts (11th Am. ed., 273) it is said : "Clearly a contract made under duress would be available in favor of the parties suffering the duress and against the party affected by the same. . . . And so by our law a man who has entered into a contract under duress may either affirm or avoid such contract after the duress has ceased." See also Bishop on Contracts, § 278.

The facts constituting the duress were immediately known to the plaintiff, and it was its duty to act promptly in repudiating the agreement which it had been induced to enter into by duress. Instead of so doing it never repudiated the agreement until it commenced this action, more than six years after the agreement of August 13th had been entered into and the bonds had been surrendered to Garrison ; and during all that time down to the commencement of this action it paid the semi-annual interest coupons upon the bonds. Even if it was induced to pay the interest during the lifetime of Garrison by promises on his part to extend financial aid in other ways to the plaintiff, the conduct of the plaintiff was, nevertheless, a complete and express ratification of the agreement of August 13th. If it surrendered its right to repudiate that agreement on account of duress it should have taken its remedy by holding Garrison to the agreement he made with it for financial aid ; but it continued to pay the interest upon these bonds for several years after Garrison had failed to keep the alleged promise he had made for financial aid to the plaintiff and after all efforts and negotiations in that direction had ceased. During several years prior to the commencement of this action the payment of interest upon these bonds was entirely voluntary. It thus emphatically and repeatedly acknowledged the defendants' title to the bonds, and when this action was commenced it was too late to claim that they had been obtained by duress. One entitled to repudiate a contract on the ground of duress should, like one who attempts to repudiate a contract on the ground of fraud, act promptly. Schiffer *v.* Dietz, 83 N. Y. 300 ; Gould *v.* Cayuga County Nat. Bank, 86 N. Y. 82 ; Baird *v.* Mayor, etc., 96 N. Y. 567 ; Bruce *v.* Davenport, 3 Keyes, 472.

There was, therefore, no error at the trial term in directing a verdict for the defendants. The essential facts upon which the defence existed were not in dispute. Our conclusion, therefore, is that it appears upon the undisputed evidence that the con-

tract of August 13th, 1881, was based upon a sufficient consideration, and that if it was obtained by duress it was subsequently ratified and confirmed.

The judgment should, therefore, be affirmed with costs.

All concur.

Judgment affirmed.

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